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NOMINATION OF JUDGE ANTONIN SCALIA

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON THE

NOMINATION OF JUDGE ANTONIN SCALIA, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

AUGUST 5 AND 6, 1986

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NOMINATION OF JUDGE ANTONIN SCALIA

TUESDAY, AUGUST 5, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 11:02 a.m., in room SD-106, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Biden, Leahy, Laxalt, Specter, Heflin, McConnell, Metzenbaum, Kennedy, Hatch, Simon, DeConcini, Mathias, Grassley, Broyhill, Simpson, and Denton.

Staff present: Duke Short, chief investigator; Dennis Shedd, chief counsel and staff director; Frank Klonoski, investigator; Jack Mitchell, investigator; Melinda Koutsoumpas, chief clerk; Mark Gitenstein, minority chief counsel; Cindy Lebow, minority staff director; Reginald Govan, minority investigator; and Christopher J. Dunn, minority counsel.

STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

This morning the committee begins its consideration of the nomination of Antonin Scalia to be Associate Justice of the Supreme Court of the United States. If Judge Scalia is confirmed, he will become the 106th person appointed to the Court.

Last week during the hearings on Chief Justice-Designate Rehnquist, I again described the qualities I believe are necessary for a member of the Court: integrity, courage, knowledge of the law, compassion, judicial temperament, and an understanding of and appreciation for the majesty of our system of government.

I believe Judge Scalia has these qualities. During his appearance before this committee 4 years ago, and during his tenure as a member of the U.S. Court of Appeals for the District of Columbia Circuit, Judge Scalia has always exhibited these qualities.

Judge Scalia has an outstanding educational and legal background. He was first in his class at Georgetown University and graduated magna cum laude from Harvard Law School, where he served as an editor of the Law Review. He has been involved in the private practice of law and has taught at the University of Virginia and University of Chicago Law Schools. Judge Scalia has also held important positions in Government. He has served as general counsel in the White House Office of Telecommunications Policy; as the assistant attorney general for the Office of Legal Counsel; and as chairman of the Administrative Conference. In August 1982, he was appointed to the Court of Appeals for the District of Columbia Circuit, which many call the second highest court in this country.

A review of Judge Scalia's actions and record in these endeavors indicates he does possess the qualities to be a great Supreme Court Justice. In addition, those who have been associated with Judge Scalia throughout his life—even if they might disagree with him philosophically—consistently describe him as: A person who is open-minded, a consensus builder, and an individual with a keen intellect and sense of humor. These are unquestionably qualities we desire in a person who is to be elevated to the highest court in the land.

Finally, Judge Scalia is now cast in the role of a symbol. Certainly, he creates great pride by being the first Italian-American who will sit on the Court. However, he also serves as a symbol in an even larger context. Judge Scalia, a first-generation American and the son of an immigrant, has been chosen by the President to be a member of the Supreme Court. By dedication and hard work, Judge Scalia has reached the apex of his chosen profession and stands as proof of the vitality of the American dream.

Judge Scalia, we again welcome you to the committee, along with your wife, Maureen, and your family. And I believe eight of your nine children are here, are they not?

Judge **SCALIA**. Yes, Senator. I do not know what happened to the ninth. He is supposed to be here, too.

He is here. They are all here, Senator. I have a full house. I was worried about that.

The **CHAIRMAN**. We have several Senators here to introduce you too, and we will hear from them and then excuse them.

The senior Senator from Virginia, Senator Warner, in which State you reside.

STATEMENT OF HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **WARNER**. Thank you, Mr. Chairman and members of the committee. It is indeed a privilege to appear before this committee to represent and introduce this distinguished American who we are privileged to have as a resident of Virginia, together with his family.

I would like to emphasize that Judge Scalia has long been a distinguished citizen of the Commonwealth of Virginia. Indeed, his first teaching position was at my university, the University of Virginia Law School.

In 1982, President Reagan named Judge Scalia to the U.S. Circuit Court of Appeals for the District of Columbia. Since that time, Judge Scalia has proven himself to possess the qualities essential for success as a member of the Supreme Court.

He is respected by his colleagues as a brilliant legal scholar, as a man of impeccable ethics and integrity. Furthermore, Judge Scalia's judicial philosophy is rooted deeply in those strong principles upon which our Constitution was founded and existed these 200-plus years. He is a thoughtful, deliberate, gentlemanly scholar who has served throughout his public life with great distinction.

Judge Scalia brings to the Supreme Court an unusually broad spectrum of experience. After graduating from Georgetown University in 1957 and Harvard Law School in 1960, he launched a career in private practice with Jones, Day, Cockley & Reavis in Cleveland, OH. In 1967, the State of Virginia became his home, when he accepted a position as a law professor at the University of Virginia Law School, teaching contracts, commercial and comparative law. Judge Scalia has served as general counsel of the White House Office of Telecommunications Policy, and in the Justice Department as head of the Office of Legal Counsel. Prior to his appointment to the circuit court of appeals, Judge Scalia returned to academia at the University of Chicago Law School.

Looking ahead to the docket facing the Supreme Court, it begins the first Monday of October. One of the great assets Judge Scalia brings with him is a willingness to face difficult issues head on, and he has had a long tradition of hard work.

Finally, as the chairman pointed out, he has the ability to successfully manage, together with his lovely wife, a family of nine children. That indicates something about his temperament as a future Justice of the Supreme Court.

From his experience as a teacher, private practitioner, a published author, member of the U.S. court of appeals, Judge Scalia represents the ideal combination of credentials for membership on our highest court.

I thank the chairman.

The **Chairman**. The distinguished junior Senator from Virginia, Senator Trible.

STATEMENT OF HON. PAUL TRIBLE, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Trible**. Mr. Chairman, I, too, am pleased to join my colleagues this morning in presenting to this committee Judge Scalia.

Judge Scalia served with distinction as an attorney, as a teacher, and most recently as a judge on the U.S. Court of Appeals for the District of Columbia. As a scholar and as a judge, he has demonstrated a rigorous intellect and a mastery of the tradition of American law.

He will bring those same qualities to the Supreme Court. I have no doubt that Judge Scalia will build a long and distinguished record of service to the Court and to our Nation.

I urge this committee act promptly and positively for this nomination.

The **Chairman**. The distinguished Senator from New York, Senator D'Amato.

STATEMENT OF ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator **D'Amato**. Thank you, Mr. Chairman. I am going to ask, Mr. Chairman, that the full text of my remarks be included in the record as if read.

The **Chairman**. Without objection, that will be done.

[Statement follows:]

PREPARED STATEMENT BY SENATOR ALFONSE D'AMATO INTRODUCING DISTRICT OF COLUMBIA COURT OF APPEALS JUDGE ANTONIN SCALIA

Mr. Chairman, it is a great honor and pleasure for me to introduce to you and to this Committee Judge Antonin Scalia as the President's nominee to be a Justice of the United States Supreme Court.

It is a source of great pride to all Americans, and particularly to all Americans of Italian descent, that this brilliant son of an immigrant is being nominated to our nation's highest court. Judge Antonin Scalia is the first Italian American ever nominated to the Supreme Court.

Judge Scalia's father came to this country through Ellis Island, as did so many millions of our ancestors. His grandfather brought his family to America seeking only the opportunity to work hard and to make a better life for his family.

When Judge Scalia's father became a professor of Romance Languages at Brooklyn College, he moved his family to Elmhurst, in Queens, New York. Antonin Scalia attended High School at St. Francis Xavier Academy in New York City. He attended Georgetown University, and graduated first in his class, summa cum laude.

At Harvard Law School, he was Note Editor of the Law Review. He graduated from Harvard, magna cum laude, in 1960.

Antonin Scalia has excelled at every area of the law to which he has turned his attention. After practicing with a well known Cleveland law firm, he taught at the University of Virginia for three years.

In 1974, he was chosen to be Assistant Attorney General for the Office of Legal Counsel—the office which is responsible for providing legal advice to the President. Serving under Attorney General Edward Levi, he demonstrated the brilliance, independence of thought, and great persuasiveness that have marked his entire career.

Judge Scalia has been a distinguished professor of law at several of our nation's, great law schools: the University of Virginia, Georgetown, Stanford, and the University of Chicago.

He has served on the United States Circuit Court of Appeals for the District of Columbia since 1982. He is universally admired by his colleagues and by the attorneys who appear before him. All cite his extraordinary intellectual ability, and his exceptional honesty, fairness, and integrity. Litigators describe him as phenomenally well prepared, and possessed of an exceptionally keen analytical mind.

The fate of his written opinions attest to the excellence of this nominee. His opinions have fared exceptionally well before the Supreme Court. Only twice has the Supreme Court failed to endorse his opinions after giving full-scale review.

Mr. Chairman, members of the Committee, I submit to you that Justice-designate Scalia has earned the great honor the President has conferred upon him. I am confident that Judge Scalia will be outstanding, not only as the first Italian-American Justice to serve on the Supreme Court, but as one of the greatest justices of any background to serve on that Court.

It is indeed a great honor to present this most able and distinguished nominee to you and to this Committee.

Thank you, Mr. Chairman.

ANTONIN SCALIA

1. *Birth:* Born March 11, 1936, in Trenton, New Jersey.
2. *Marriage:* Married to Maureen McCarthy, Sept. 10, 1960; nine children (Ann Forrest, Eugene, John Francis, Catherine Elisabeth, Mary Clare, Paul David, Matthew, Christopher James, and Margaret Jane).
3. *Education:* Georgetown University and University of Fribourg (Switzerland), A.B., 1957; Harvard Law School, LL.B., 1960; Harvard Law Review: Sheldon Fellow, Harvard University, 1960–61.
4. *Bar:* Admitted to practice in Ohio (1962) and Virginia (1970).
5. *Experience:* In private practice with Jones, Day, Cockley and Reavis, Cleveland, Ohio, 1961–67; professor of law, University of Virginia Law School, 1967–74 (on leave 1971–74); General Counsel, Office of Telecommunications Policy, Executive Office of the President, 1971–72; Chairman, Administrative Conference of the United States, 1972–74; Assistant Attorney General, Office of Legal Counsel, Department of Justice, 1974–77; Scholar in Residence, American Enterprise Institute, 1977; Visiting Professor of Law, Georgetown University, 1977; Professor of Law, University of Chicago, 1977–82; Visiting Professor of Law, Stanford University, 1980–81; Editor, Regulation Magazine, 1979–82; Chairman, ABA Section of Administrative Law, 1981–82; Chairman, ABA Conference of Section Chairman, 1982–83; Board of Visitors, J. Reuben Clark Law School, Brigham Young University, 1978–81; Nominated by President Reagan to U.S. Court of Appeals for the District of Columbia

Circuit July 15, 1982, confirmed August 5, 1982, took oath and assumed duties August 17, 1982.

Senator D'AMATO. Mr. Chairman, it is a great honor and, indeed, a privilege for me to be here with my colleagues to present to you and to the committee Judge Antonin Scalia as President Reagan's nominee to be a Justice of the U.S. Supreme Court. It is a source of great pride to all Americans, and particularly to all Americans of Italian descent, that this brilliant son of an immigrant is being nominated to our Nation's highest court.

Judge Antonin Scalia is the first Italian-American ever nominated to the Supreme Court, and it is a source of great, great pride to the Italian-American community. And Mama D'Amato, Judge, sends her best.

Judge SCALIA. Thank you, Senator.

Senator D'AMATO. Judge Scalia's father, Mr. Chairman, came to this country through Ellis Island, as did so many millions of our ancestors. His grandfather brought his family to America seeking only the opportunity to work hard and to make a better life for his family.

When Judge Scalia's father became a professor of romance languages at Brooklyn College, he moved his family to Elmhurst in Queens, NY. Antonin Scalia attended high school at St. Francis Xavier Academy in New York City. He attended Georgetown University and graduated first in his class. At Harvard Law School, he was note editor of the Law Review and graduated magna cum laude from Harvard in 1960.

Antonin Scalia has excelled at every area of the law to which he has turned his attention. After practicing with a well-known Cleveland law firm, he taught at the University of Virginia for 3 years and, thereafter, had an exemplary career in the law as a professor, as a practitioner of the law and as a noted jurist.

Mr. Chairman and members of the committee, I submit to you that Justice-designee Scalia has earned the great honor that the President has conferred upon him, and I am confident that Judge Scalia will be outstanding not only as the first Italian-American Justice to serve on the Supreme Court, but as also one of the greatest Justices of any background to serve on that Court.

Indeed, it is a great honor for me to be able to present to this distinguished committee this very distinguished nominee.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. We appreciate you gentlemen being here and speaking and introducing Judge Scalia. You are now excused. Of course, you may remain if you care to.

Senator Moynihan cannot wait. We will proceed with the distinguished ranking member, Senator Biden of Delaware.

STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Senator BIDEN. Thank you, Mr. Chairman.

Judge Scalia, congratulations.

Judge SCALIA. Thank you, Senator.

Senator BIDEN. On being nominated by the President, you and your family must be proud. They are a good-looking family, all of them.

I have a brief statement. I ask unanimous consent that my entire statement be placed in the record.

The CHAIRMAN. Without objection, so ordered.

Senator BIDEN. Let me say to you, Judge Scalia, and to my colleagues on the committee, that this hearing, although equally as important, is different than the hearing we had last week, in my view. We last week looked at the Chief Justice and the role of the Chief Justice. As one Senator, I believe that there is a distinction between the role of the Chief and the role of an Associate.

And second, we do not have 15 years of Supreme Court decisions to look at and to pore over, to make judgments about what your jurisprudential philosophy is, Judge. You do have 4 years on the circuit court. Most of the decisions I have read, the vast majority, relate to administrative questions—very important, but nonetheless, they do not give us quite the full range of review that we have with regard to Justice Rehnquist.

Therefore, I believe it very important that we spend some time today discussing, and you discussing with us as freely and as openly as you have a reputation for doing, your judicial philosophy.

Therefore, I am going to pursue about six areas, judge, with you, based upon my review of your writings and your opinions. At the heart of my inquiry will be an effort to obtain a better understanding of how you view the Constitution as limiting the role of the Federal Government, or government at all levels, for that matter, in solving societal problems.

First, I will seek to better understand how you view the Constitution as limiting the use of independent regulatory agencies and protecting the health and welfare of Americans. For example, are there constitutional limitations on what Congress can and should delegate to these regulatory agencies?

Second, what is the proper role of statutes in solving the problems that face this Nation? How specific must Congress be in crafting these solutions? Would you place a straitjacket on my colleagues in terms of requiring such specificity that normal political processes could become in fact a logjam? Or where Congress, by design, leaves ambiguity, what role does the executive branch, the courts, and in particular, the legislative history have in determining how that ambiguity should be fleshed out.

And third, I want to talk to you about what standards should guide the Supreme Court in determining the original intent, or to use your phrase, the original meaning of the Bill of Rights or of the Civil War constitutional amendment. And what do you mean by the notion that the Court should not create new rights under the Constitution unless a societal consensus—if I read your writings correctly—exists for that new right? What would this have meant to the Court that wrote *Brown* v. *the Board* or *Baker* v. *Carr* or any number of other decisions? And what should it mean to a Court which is going to face reconsideration of *Roe* v. *Wade*.

The fourth thing I would like to talk to you about is what are your personal views on the proper scope of the concept of executive privilege, something we have some interest in of late here in this committee, especially when Congress seeks documents on a nominee pursuant to its constitutional responsibility to exercise its advice and consent function.

The fifth area is what are your views on the first amendment, especially as it relates to the freedom of the press, and expression of speech through symbolic acts?

And the sixth and last area I would like to raise with you, judge, as we go on today is what is your view of the most elusive but, in my view, one of the most cherished principles; that is the right to privacy.

In every case I will view your answers through the lens of their relationship to the settled judicial notions and the overall balance of the Court. But I will do so with the full recognition that in each of these areas there is plenty of room for healthy and principled disagreement, and I look forward, I truly look forward to discussing these areas with you and hope you find today a pleasant undertaking.

Judge SCALIA. Thank you.

Senator BIDEN. And that your family concludes that, also.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF SENATOR BIDEN

Last week we began the process of participating in what may become a watershed in the history of the Supreme Court. Today we begin the second chapter of that story.

While the selection of a Chief Justice, the head of a coordinate branch of Government is of obvious moment, the responsibility we face today is no less important. For no matter what we do in the case of Justice Rehnquist he will continue to serve on the Court.

In the case of Judge Scalia we will actually be adding a new person to that elite body of men and women which nurtures and preserves our constitutional heritage.

In a sense the challenge in the case of Mr. Scalia may be greater. At least in the case of Justice Rehnquist we have over a decade of published opinions. In Mr. Scalia's case we have only four years of written opinions. And those were written as a court of appeals judge where the variety of issues and his discretion to examine old cases or make new law is considerably more limited than that of an Associate Justice of the Supreme Court.

Furthermore, his background as an academic and an executive official presents a different body of writings than does Mr. Rehnquist's numerous Supreme Court decisions. First, because as an academic Mr. Scalia was fond of the provocative argument and as an executive official he was expressing the opinion of his client. In both cases it is difficult to ascertain if the opinions he expressed are a genuine reflection of his philosophy.

No matter how daunting, we must and will pursue a better understanding of Mr. Scalia's jurisprudence.

Here again there is a significant difference between what we are about this week from what we sought last week. Last week I sought to understand Mr. Rehnquist's views in large measure to determine whether he could perform the role of chief, as a centrist, a symbol, and a consensus builder.

That is less relevant, if not irrelevant, in the case of evaluating an Associate Justice. I firmly believe that a diversity of views from liberal to conservative should be represented on the bench. To paraphrase Justice Rehnquist in a recent interview—just as it would be wrong to have 9 Justice Rehnquists it would also be wrong to have 9 Justice Brennans on the Court.

America's faith in its Judicial Systems and the rule of law is based in large part in the belief that most of our fellow citizens share that any person can get a fair hearing before openminded jurists. At the heart of that faith, I believe, is the conviction that our whole system of justice is capped with a Supreme Court composed of a diversity of opinions and background.

Most Americans believe like I do, that when the case has been heard and the justices retire to that conference room to argue and vote that a full variety of opinions well be ventilated.

That is why the primary line of inquiry is to determine whether the nominee adheres to a judicial philosophy that would unravel the broad fabric of settled practices. Such a nominee should be rejected because his or her presence on the Court could severely disrupt the delicate process of constitutional adjudication. But by the same token the mere fact that the nominee disagrees with me on the outcome of one or another matter within the legitimate parameters of debate is not enough, by itself, for this Senator to oppose the nomination.

In the end, I agree with Justice Rehnquist, and the chairman of this committee as expressed on numerous occasions over the past few decades, to not explore a nominee's jurisprudence would be a dereliction of our duty under the "advice and consent" clause of the Constitution.

Therefore, I will pursue at least six areas of jurisprudence with the nominee based upon my review of his writings and opinions. At the heart of my inquiry will be an effort to obtain a better understanding of how this nominee views the Constitution as limiting the role of the Federal Government or Government at all levels, in solving the problems of society.

So first, I will seek to better understand how he views the Constitution as limiting the use of independent regulatory agencies in protecting the health and welfare of Americans. For example, is there a constitutional limitation on what Congress can and should delegate to regulatory agencies?

Second, what is the proper role for statutes in solving the problems we face as a nation. How specific must Congress be in crafting solutions? Would the nominee place a straitjacket on my colleagues in terms of requiring such specificity that the normal political process would become a log jam? And where Congress by design leaves ambiguity, what role does the executive branch, the courts and in particular legislative history play in fleshing out the details?

Third, what standards should guide the Supreme Court in determining the "original intent" or "original meaning" as he prefers to say of the Bill of Rights or the Civil War constitutional amendments? What does he mean by the notion that courts should not create new rights under the Constitution unless a societal consensus exists for that new right? What would this have meant to the Court that wrote *Brown* v. *The Board or Baker* v. *Carr?* And what should it mean to a court which faces a reconsideration of *Roe* v. *Wade?*

Four, what is the nominee's personal view of the proper scope of the concept of executive privilege especially when Congress seeks documents on a nominee pursuant to its constitutional responsibility to exercise "advice and consent"?

Five, what is the nominee's view of the first amendment especially as it relates to freedom of press and the expression of speech through symbolic acts?

Six, what is the nominee's view of that most elusive but cherished constitutional principle of the right to privacy?

In every case I will view the nominee's answers through the lens of their relationship to settled judicial notions and the overall balance on the Court. But I will do so with the full recognition that in each area there is plenty of room for hearty and principled disagreement.

Thank you.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. Thank you, Mr. Chairman——

The CHAIRMAN. Just a minute. Let me make this statement: We have a right to make an opening statement, and I am not going to try to curb any of them. At the same time, there is no use to tell what you are going to go into. Just wait and go into it later. You will save a lot of time.

The Senator from Maryland.

STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. Mr. Chairman, I am glad to join with you and other members of the committee in welcoming Judge Scalia here this morning. Judge Scalia comes before us with an impressive record of achievement and persuasive endorsements, not to mention the recommendation of the President of the United States.

There is, from the outset, no doubt that he has the intellectual attainments and the legal and judicial experience to serve effectively on the Supreme Court. Judge Scalia's strong credentials make it all the more important that we pause at the beginning of this process to reflect on the importance of the task that the Senate is about to undertake.

No responsibility entrusted to the Senate is more important than the duty to participate in the process of selecting the judges of the U.S. courts. Our role in this process is different from any other business that comes before the Senate. Most of the other decisions we make are subject to revision, either by the Congress itself or by the executive branch. Statutes can be amended, budgets rewritten and appropriations deferred or rescinded. Of most of the legislative sins we commit in haste, we can repent at leisure. But a judicial appointment is different because it is for life.

The decisions of a judge of an inferior court are subject to correction in the appellate process. If the system works as it should, no lower court judge can stray too far from the law of the land.

But a Supreme Court Justice is different. In Justice Jackson's famous dictum, that tribunal is not final because it is infallible; but it is, in the constitutional sense, infallible because it is final. Precedent controls a lower court's disposition of a constitutional controversy. But for the Supreme Court of the United States, precedent is a path that the Court may usually—but need not always—choose to follow.

Judge Scalia, if he is confirmed, will be charting new routes, and correcting old courses. So the Senate has an obligation to find out, as best we can, where the nominee would take us before we decide whether to empower him to take us there.

The Supreme Court has an unparalleled power under our constitutional system to advance the cause of liberty, or to impede it; to strengthen the foundations of republican government or to undermine them. That may help to explain why the Framers of the Constitution thought that the power to appoint justices was too important to be reposed within the hands of one branch of Government alone.

Of this sharing of power—the President's to nominate, the Senates to confirm—Hamilton wrote that, "It is not easy to conceive a plan better calculated than this to produce a judicious choice of men for filling the offices of the Union." In the process that begins today, the Nation once again puts Hamilton's assertion to the test.

Judge Scalia merits our congratulations. He is the President's choice for an office of unsurpassed importance. He also deserves our wishes for good luck, for the scrutiny that this nomination will receive will be and should be thorough and exacting. The Constitution, and our oaths to support and defend it, demand no less.

For when we carry out our duty to give the President advice and to consent to his nomination, as our predecessors first did nearly 200 years ago, our first loyalty, like theirs, is neither to the party nor to the President, but to the people and to the Constitution that they have established.

If we cannot act and recognize that higher loyalty when we confirm judges, then we cannot demand it of the judges that we confirm.

Thank you, Mr. Chairman.

The CHAIRMAN. Our next opening statement is by Senator Kennedy. Senator Kennedy, I notice that Senator Domenici has come in. Senator Moynihan is here, too. Would you mind giving them 3 minutes each?

Senator **Kennedy**. I welcome my colleagues. I would like to hear from them.

The **Chairman**. Senator Domenici and Senator Moynihan, you all come around.

We took the Senators before we started opening rounds, but you were not here. We saved you time, and we will take you now for 3 minutes each.

We will put your full statements in the record, if you want to, and you can take 3 minutes to give the thrust of it.

Senator **Domenici**. Thank you very much, Mr Chairman.

Senator **Kennedy**. If I could at the outset, we welcome Senator Domenici. We have had Senator D'Amato, and we have Judge Scalia who all come from a certain ethnic background. If this establishes a precedent, I want the Chair to understand we have 32 Irishmen in the Senate. When there is an Irish nominee, the agenda will be very filled. But we are delighted to have Senator Domenici here this morning.

STATEMENT OF HON. PETE V. DOMENICI, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator **Domenici**. Senator Kennedy, if that happens and I am up there, I would welcome all 32.

First of all, Mr. Chairman and members of the committee, I am not here to discuss Judge Scalia's legal abilities. Actually, he is lucky that I am not going to do that because I heard that he wrote the opinion striking down Gramm-Rudman-Hollings.

But in any event, this is a great day for me and I would not miss this unless you would not let me talk.

You are all aware of the litany of Antonin Scalia's successes all the way from graduated summa cum laude from Georgetown, nagna cum laude from Harvard, graduate fellow at Harvard, associate with a prestigious law firm, law professor at four universities Assistant Attorney General, Judge of the U.S. Court of Appeals, and on and on and on. That is many lifetimes worth of achievement for most of us.

As a scholar and a judge, he has made many major contributions to our jurisprudence on administrative law, separation of powers, libel and slander law, and many other areas. And as I see it, he is now poised to proceed to the pinnacle of his profession.

It is a distinct pleasure for me to speak on his behalf because he is a personal friend. I have no doubt that you have read the wonderful tributes to him, which use terms such as articulate, energetic, gregarious, brilliant, intelligent, and quickwitted. They are there all the time whenever you read about him. But actually, Judge Scalia's nomination is meaningful to me for another reason. Judge Scalia is the first American of Italian extraction to be nominated to serve on the Supreme Court in the history of the republic.

I believe this is a magnificent tribute to the Italian-Americans of this Nation. Our President has repeatedly said that he will pick the very best men and women he can find to serve on this Court.

In this case, he has fulfilled that promise. Judge Scalia is the very best.

In this case, the best happens also to be an Italian American. There are millions of Italian Americans in this country, many of whom started with nothing, many of whom started with immigrant parents who may not have even spoken English, such as mine. Judge Scalia's father came here from Italy as a young man. His mother was the duaghter of immigrants from Italy, also.

Obviously, it is with great pride that we witness one who shares our history and our traditions nominated to serve on the highest court of our Nation. Of course, Italian Americans are Americans first and last, and it is because we are Americans that we applaud a fellow Italian American's achievement of the American dream.

This is truly a success for Italian Americans and obviously a magnificent success for the American tradition. I have no doubt that Judge Scalia will serve with distinction on the Supreme Court and will make all Americans proud to call him one of their own.

I thank you very much for permitting me to testify on his behalf.

The CHAIRMAN. Thank you very much, Senator.

The distinguished Senator from New York.

STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Mr. Chairman, I appear to express the satisfaction and, indeed, high expectation and gratification of another ethnic group in our country, which is to say the academics, for the appointment of Judge Scalia. He comes from a distinguished academic family. His father was a professor of romance languages at Brooklyn College. He himself graduated from Xavier High School in Manhattan and went on to Georgetown and then to Harvard.

He did practice law with great success for about 8 years, but thereupon went into the teaching of law which has been his avocation ever since.

Judge Scalia's nomination by President Reagan marks the first time a professor of law has been nominated to the Court since Wiley Ruthledge was appointed in 1943 by Franklin D. Roosevelt. The last law professor to sit on the Court was Felix Frankfurther who President Roosevelt nominated in 1939. That is 47 years, sir, and 47 years between law professors is long enough.

And on that note, I would like to let you get on with these hearings.

The CHAIRMAN. Thank you very much, Senator.

Senator MOYNIHAN. May I say, also, expressing the appreciation of this member of the Finance Committee, over the years we have had more than one occasion when Judge Scalia has advised us, testified before us on constitutional issues regarding taxation. He invariably has been a source of counsel and guidance and good judgment, in our view, and I commend him to this honorable committee.

The CHAIRMAN. Thank you both for your presence and for your testimony. We will now hear from Senator Kennedy.

STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. Thank you very much, Mr Chairman. I want to begin by commending Judge Scalia on his nomination to the Supreme Court. At the outset, let me say that this nomination, certainly at this stage, raises fewer of the concerns that have led me to oppose the nomination of Justice Rehnquist to be Chief Justice.

In my view, Justice Rehnquist's career of relentless opposition to fundamental claims involving issues such as racial justice, equal rights for women, the freedom of speech, and the separation of church and State places him outside the mainstream of American constitutional law as an extremist who should not be confirmed as Chief Justice of the United States.

Judge Scalia has been on the bench only 4 years. He has not ruled on many basic constitutional issues. His record in these areas is less complete than Justice Rehnquist's. On the available record, I disagree with Judge Scalia on women's rights, and it is fair to say that his position on this issue seems as insensitive as Justice Rehnquist's.

I am also concerned about Judge Scalia's writings on two important areas in administrative law, his apparent views that the independent agencies are unconstitutional and the courts can undo the New Deal by denying Congress the power to delegate authority of regulatory agencies.

But in other areas that are of major concern to me, it is difficult to maintain that Judge Scalia is outside the mainstream. Should he be confirmed as a Justice, I would hope that as a result of these hearings and his new rank, he will look with greater sensitivity on critical issues, especially on race discrimination, the right of women to escape their second-class status under the law and to share fully in the protections of the Constitution.

Finally, as far as I can determine from the investigation carried out so far, the nomination of Judge Scalia presents none of the troubling issues with respect to the truthfulness, the candor, judicial ethics, and full disclosure that have marked the nomination of Justice Rehnquist. And as a scholar, public official, Federal judge, Mr. Scalia has demonstrated a brilliant legal intellect and earned the respect and the affection of colleagues whose personal philosophies are far different from his own.

I look forward to his testimony

The CHAIRMAN. The distinguished Senator from Nevada.

STATEMENT OF SENATOR PAUL LAXALT

Senator LAXALT. Judge Scalia, welcome to the committee. I could not have been more delighted than when I was informed that the President had settled upon you for this very high position.

Looking at that wonderful family out there, they all must be proud. You are really experiencing the American dream today in many respects. To have the son of an Italian immigrant rise to this very high position has to be a singular experience for each of the members of the family.

I have a strong suspicion that these are going to be very civil hearings, far more so than last week, because I cannot think of one of my colleagues who would dare arouse the ire of the Scalia clan. [Laughter.]

As far as the family is concerned, at times these questions are going to be hard and difficult. There is a reason for that; because under the Constitution, we on this committee and the full Senate have a serious fundamental constitutional responsibility. It is up to us not to rubberstamp the recommendation of the President, but to take an independent look. We do that, and it is a trying experience, very often, for all concerned.

Please understand that every one of the members of the panel here is attempting to discharge his responsibility as he sees fit as a member of this very important committee.

I feel very strongly, Judge Scalia, you are going to acquit yourself well because you are a pro. You are a thoroughbred. I look forward to a speedy confirmation.

I thank the Chairman.

The **Chairman**. The distinguished Senator from Ohio.

STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator **Metzenbaum**. Judge Scalia, we are happy to welcome you here and welcome your family as well.

Parenthetically, I would like to say that looking out at that youngest daughter of yours and your young son, I do not think there is any requirement that they sit through these laborious, tedious hearings. Any time they leave, I think every one of us on the committee will understand that they still support you, but it is a rather tiring process for young children.

Judge Scalia is an accomplished scholar. A former assistant attorney general, sitting judge of the court of appeals, and well known in my own community of Cleveland, where he practiced law for 6 years.

There can be little question about the fact that he is qualified for the position of Associate Justice. To my knowledge, there are no allegations of impropriety or misconduct. Consequently, I believe the integrity of the nominee is not in issue.

Judge Scalia, you know personally of your own area of bad judgment. I think it was bad judgment in whipping me on the court, not in the courts, but I think that, too, can be passed over and not made a major point of issue.

Judge **Scalia**. It was a case of my integrity overcoming my judgment, Senator.

Senator **Metzenbaum**. Touché. [Laughter.]

My only area of concern relates to some of the views Judge Scalia has stated in a number of critically important areas such as the proper approach to constitutional interpretation, separation of powers, and the circumstances under which citizens may seek relief in Federal court for Government action. Judge Scalia seems to take a view that there should be very little limitation on the authority of the executive branch. That view concerns me because the Framers of the Constitution clearly had in mind that the three branches of Government were to be coequal. No branch would be able to dominate the others. I also have concerns about his approach to interpreting the Constitution. Some of your statements suggest that the role of the courts is to carry out the will of the majority, yet this country was founded on the principle of individual freedom. The Bill of Rights was adopted as a permanent guarantee that the majority could not limit certain basic rights of individuals.

I have no doubt that I disagree with Judge Scalia on many issues, not simply issues of political philosophy, but of statutory and constitutional interpretation. But whether or not we agree on these issues is not a valid question as I exercise my advice-and-consent responsibility. The question is whether we will be faithful to fundamental constitutional values even if he may apply those in particular cases differently than I or any other Senator may prefer.

I have an open mind on this nomination. As in the case of the nomination for Chief Justice, we have an obligation to conduct thorough and complete hearings, even though the process is a demanding one for the Senate as well as the nominee.

Finally, I note that some Senators, including myself, have requested documents from the Justice Department, including certain memorandums prepared by Judge Scalia when he was in the Justice Department. As in the case of Justice Rehnquist, these memorandums were prepared while Judge Scalia was head of the Office of Legal Counsel. In this position, he was the chief legal adviser to the executive branch on a highly significant legal issue, issues that are of direct concern to the Senate considering this nomination.

I sincerely hope that the President will not choose to assert a claim of Executive privilege in denying us access to those documents. The country will be better served, and this process will be expedited, if the President does not assert the privilege.

I might also point out that based on his own—that is, the President's own 1982 Executive order regarding Executive privilege, it should not have been asserted in the case of Justice Rehnquist, and it should not be asserted in this instance.

I believe the Senate is determined to carry out its obligation in a responsible way, and I hope the President is as well.

I welcome you to these hearings, Judge Scalia, and look forward to working with you.

Judge SCALIA. Thank you, Senator.

Senator MATHIAS [presiding]. The Senator from Utah.

STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Thank you, Mr. Chairman. Welcome to the committee, Judge Scalia. We look forward to this confirmation proceeding. I do hope it will not be quite as strenuous as the one last week.

I would ask that my full statement be placed in the record.

Perhaps no standard speaks more eloquently to the merits of this nomination than the performance of Judge Scalia on the Court of Appeals for the District of Columbia Circuit. In more than 4 years on that esteemed court, he has written 86 majority opinions and only 9 of them have been accompanied by a dissenting opinion.

In other words, Judge Scalia has won unanimous approval for his views in nearly 90 percent of his written opinions. Another 90-percent measure of success is found in the rate at which Judge Scalia's positions have been sustained on appeal. The Supreme Court has adopted his views six out of the seven times his cases have been reviewed on appeal. This includes his courageous opinion in the *Synar* case which identified the separation of powers problems in the budget-cutting Gramm-Rudman law.

These facts are high praise for Judge Scalia from those best positioned to adjudge his legal stature and ability; those are his fellow judges. These judicial actions speak a lot louder than even the words of his judicial colleagues, among whom is Circuit Judge Abner Mikva who hails this appointment as "good for the institution" of the Supreme Court.

That is high praise.

I have a lot more to say, but let me just cite the report of the Almanac of the Federal Judiciary that Judge Scalia is highly respected in all categories, admired even by those lawyers who disagree with him. Over and over, the same qualities are admired in Judge Scalia—his fairness, his integrity, his openness to varied viewpoints, his amazing mastery of the law. Judge Scalia is respected as a lawyer's lawyer, by lawyers, and as a judge's judge by judges. In the words of the American Bar Association, this committee is privileged to consider the nomination of an individual who "is among the best available for appointment to the Supreme Court," The ABA has given you the highest rating they can possibly give to any candidate for this position.

I am happy to welcome you to the committee. I respect you. I have read your opinions. You will add a great dimension to the Court. I agree with my colleague, Senator Laxalt. There is no question that this is a happy day for millions and millions of Americans. As a matter of fact, I think it should be a happy day for all Americans

Thank you, Mr. Chairman.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman, perhaps no standard speaks more eloquently to the merits of this nomination than the performance of Judge Scalia on the Court of Appeals for the District of Columbia Circuit. In more than 4 years on that esteemed court, he has written 86 majority opinions and only 9 of these has been accompanied by a dissent. In other words, Judge Scalia has won unanimous approval for his views in nearly 90 percent of his written opinions. Another 90 percent measure of success is found in the rate at which Judge Scalia's positions have been sustained on appeal. The Supreme Court has adopted his views six out of the seven times his cases have been reviewed on appeal by the Court he has been appointed to join. This includes his courageous opinion in the *Synar* case which identified the separation of powers problems in the budget-cutting Gramm-Rudman law.

These facts are high praise for Judge Scalia from those best positioned to adjudge his stature and ability, his fellow judges. These judicial actions speak barely louder than the words of his judicial colleagues, among whom is Circuit Judge Abner Mikva who hails this appointment as "good for the institution" of the Supreme Court.

From these lofty commendations, the acclaim for Judge Scalia's appointment continues to crescendo. The American Bar Association, with a collegial accord matching that of Judge Scalia's written opinions," has unamimously concluded that Judge Scalia is well qualified for this appointment. Under the committee's standards," The ABA continues on behalf of most of America's lawyers and Judges," This means that Judge Scalia meets the highest standards of professional competence, judicial temperament and intergrity and is among the best available for appointment to the Supreme Court." It is hard to imagine higher commendation from an organization of lawyers and judges than to call one of their own "among the best available for appointment to the Supreme Court."

The Chicago Tribune strikes the same theme by calling Judge Scalia a "lawyer's lawyer: Meticulous, measured, determined to read the law as it has been enacted by the people's representatives rather than to impose his own preference upon it." It is interesting to note that many themes are repeated over and over by those examining Judge Scalia's accomplishments. For instance, former attorney General Edward Levi calls Judge Scalia a "Lawyer's lawyer" and states that he "came to know, with awe, how his mind works, his mastery of the law in principle and in practice, his high integrity and commitment to fairness, and his openness to the careful consideration of differing views."

Dean Guido Calabresi of the Yale Law School confesses that he has differed with Judge Scalia on many issues, yet he strikes many of the same themes:

"I have always found him sensitive to points of view different from his own, willing to listen, and though guided, as any good judge should be, by a vision of our Constitution and the roles of judges under it, flexible enough, also as a good judge should be, to respond to the needs of justice in particular cases."

This candid assessment verifies the report of the "Almanac of the Federal Judiciary" that Judge Scalia is "highly respected in all categories, admired even by those lawyers who disagree with him."

Over and over the same qualities are admired in Judge Scalia—his fairness, his integrity, his openness to varied viewpoints, his amazing mastery of the law. Judge Scalia is respected as a lawyer by lawyers, as a judge by judges. In the words of the American Bar Association, this committee is privileged to consider the nomination of an individual who "is among the best available for appointment to the Supreme Court."

Senator MATHIAS. Thank you, Senator Hatch.

Senator DeConcini.

STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DECONCINI. Mr. Chairman, thank you. I want to first not only welcome Judge Scalia, but I want to thank Chairman Thurmond for the way he operated and conducted the hearings last week on behalf of Justice Rehnquist. I know that my colleagues and I have had, I think, an excellent opportunity to question the witnesses at length, going into any subject matter. I know there is great pressure to move these nominations along, but I particularly want the record to show my deep appreciation to Chairman Thurmond in his fairness.

Mr. Chairman, I realize as I am sure we all do, that an equal responsibility now lies with us in the hearings of the nomination of Judge Scalia for Associate Justice of the U.S. Supreme Court.

Judge Scalia, if confirmed, will likely spend many many years on the Court, sharing an equal vote with the Chief Justice and the other Associate Justices. It is therefore our responsibility to keep up the steam, and fulfill our constitutionally mandated role of advice and consent on the nomination of Judge Scalia. Our job here is as important as the deliberation we took last week with respect to Justice Rehnquist.

Indeed, Justice Rehnquist will remain as a voting member of the Supreme Court regardless of the final action of this committee and the Senate on his confirmation for Chief Justice. Judge Scalia, however, is a new voice for the Court. It is of tremendous importance that we give this hearing our full energy and attention; let no one say that the Judiciary Committee ignored its duty to examine the President's nominee for Associate Justice.

I must say that I am very pleased that the President has nominated a person with the experience and credentials of Judge Antonin Scalia. Clearly, we have before us a nominee with legal experience, public service, academic experience, and judicial experience.

The American Bar Association has found that Judge Scalia meets the highest standard of professional competence, judicial temperament, and integrity. I am pleased to concur that he is indeed among the best available candidates for consideration. Judge Scalia comes to us from the D.C. Court of Appeals with an outstanding reputation. He frequently writes his own opinions without the aid of the first draft prepared by a clerk. He prepares extensively for his oral arguments, writing his briefs himself. He is clearly a man who will make his presence felt on the Supreme Court. He is a hard worker, but one who is personable. He has a great number of friends across the political spectrum of this town, and I am sure in each community that he has lived in.

I take pride as an Italian American in noting Judge Scalia's heritage. In this year that our country has shown so much pride in celebrating the 100th anniversary of the Statue of Liberty, we can take note of the contribution of Judge Scalia, the son of an Italian immigrant.

He is but another example of immigrants who have risen to outstanding positions in our Government and served in the judiciary.

As a first generation Italian American, Judge Scalia demonstrated that the rapid assimilation of immigrants pumps strength and vitality into this great Nation.

I wish to join my colleagues in extending a warm welcome to you, Judge Scalia. Regardless of your personal opinions on the operation of this branch of Government, I hope you look forward, as I do, to these hearings. There will be some tough questions asked of you and I am sure you will meet those questions head on, as you have in your past life, but I believe that you are eminently qualified for this position and will serve this country well. Thank you, Mr. Chairman.

Senator **Mathias**. Thank you, Senator DeConcini. The distinguished Senator from Wyoming.

STATEMENT OF SENATOR ALAN K. SIMPSON

Senator **Simpson**. Well, welcome to "the pit." I am privileged to welcome you here, and your fine wife and family. This is our role of advice and consent, a function we perform which is of great import and significance. I very much enjoyed my visit with you prior to these proceedings. I have come to have great respect for you when you appeared before this committee in 1982.

I will not go on to relate your extraordinary background, which is most impressive to me. Your decisions are most impressive. I have actually read some of those, and it is marvelous—the way you have that ability to bring that remarkable brilliance to a form where the common person can understand. That is what the law is all about. What good are we as lawyers or judges if the things we do for our clients, or for a case, cannot even be understood?

So I am impressed by that. Well, I would just share with you, that I missed a day or two of the action last week while I was marrying off the oldest son, and I assume that you have been watching the attempt at evisceration of William Rehnquist. The "great hunters" have been out to tack the "pelt" of Bill Rehnquist on the wall of the den. Quite an exercise. It is like that old Clint Eastwood movie, "The Good, the Bad, and the Ugly," and it was, and it is. I will be curious to see how tough, and ringy, and red faced we can get, to point and posture and pontificate, ruffle up like a sage chicken, and even take a shot at the poor old Alfala Club. That is named after the plant that sends its roots deepest for liquid refreshment. Thus the name.

That is Alfalfa Club, a patriotic and fun-filled evening which is held once a year, and attended by every President for nearly 80 years.

So that is what is so very frustrating for me, because these are my friends here on this panel, Democrats and Republicans alike. I admire, I respect them, and enjoy them, regardless of their ideology, and we have broken bread together.

None of them are perfect, I can assure you. I am not perfect, I can assure you. Then why the ritual? The known human frailties that beset us all, just the known ones, are enough to confound us and confuse us in our own lives. The unknown ones we do worse with. Who appointed us the scorekeepers? Who appointed us the judge? Who writes the exams here? And who grades them?

Those roles are all self-appointed here. Well, we certainly washed all the laundry on Bill Rehnquist. I assume we will do that with you. And yet not one of us, not one of us up here would want to sit right there at that table. We could not pass the test. We could not stand the heat. It is easier up here. Here we can brag and bluster, and blather, and, almost like a comic book character, you could invent "Captain Bombast," pull the cape around the shoulders, and shout the magic words, "Get him," and rise above it all in a blast of hot air.

Now that is what we see. It is funny, but it really is not very funny at all. Human beings are involved, real families, and real hurt are out there. In the real world here we see the inquisitors, and the accused—and that is the word I wish to use—not Presidential nominee. The accused.

How can we demand perfection of others, now, or in the past, when we do not have that in ourselves? How can we expect perfection in legislating, or in judging on a court, or in the world of business, or sports, or assembly lines, any task, when we do not have it in our own lives. Well, not me. I have flunked out on perfection. I can tell you an awwul lot about my imperfections but not much about the "perfect Simpson." And so we have listened, and I do not know what the "mixed bag" will be for you, but it will be curious.

But we have listened before in the Rehnquist hearings to ballot security, in days, when you were, by law, to ask people if they could read the Constitution of the United States before they could vote. That may be harassment in some other State. In Wyoming it was the law—repugnant, bad law, but the law. Memos of a young law clerk, memos of a young lawyer, memos to a judge, memos that fit, memos that did not fit. Memos and decisions that were made, were ill-considered, ill-advised, or a little dumb, or dull. Restrictive covenants contained in deeds on my family home in Cody, WY, in 1931 or yours, somewhere along the line. That is the way they used to do their tricks in those days, repugnant, unconstitutional, disgusting, but there. Or the home of every one of us, or our parents, or our grandparents, how fascinating. Stonewalling, wiretapping, "coverup." Lord sake, there is not one of us here at this table that has not dabbled in all that mystery.

And then the documents of a confidential nature, a sinister connotation that documents—about documents—that have never been released under any administration.

Well, enough. Three sitting Members, though, of this U.S. Senate, right now, voted against the sweeping Civil Rights Act of 1964. Do we keep score on them? Do we let them know we will never forgive? They changed, they listened, they adopted, they adapted, and they learned. Don't others get that leeway in this particular arena?

Oh, I tell you I can hear it now: "Oh, Simpson, you old silly. There is a higher standard here for the Attorney General or for the Supreme Court, or for the Federal district court. There is a nobler and higher yardstick for the Chief Justice or the Justice." Or for any Presidential appointee. Well, what bosh and twaddle that is. What arrogance that is, true arrogance. A higher standard than that for a U.S. Senator, a proud office we all cherish and lusted after, and try to honor? Just because we get elected? Well, we have a word for all that in Wyoming. It is succinct, scatological, and searing when it is said in the proper Western twang. What a spectacle it is, and some of it is planned for you, sir.

So, dig in and keep your fine humor. Tell them you did play the piano, and they will likely ask you where, and when, and whether the place was properly licensed, or were there girls there.

But through all the heavy guff that you will get, just recall that all of us, every single one of us right here, sitting here now, or outside, and me, too, who are your inquisitors, have already flunked the real test.

The real full and mature test of a full life lived, and, none of us, now, could, or would, or did, escape the barrel of the weapon turned back in our face.

I think it was stated rather simply in an old and powerful, and never outdated classic by a chap named John—whose last name escapes me at this time—who said: "He that is without sin among you, let him first cast a stone."

It seems fair, doesn't it? Well, we shall see. It sure has not happened yet. America knows it and they are galled by it, and they are offended. Thank you.

The **Chairman**. The distinguished Senator from Vermont.

STATEMENT OF SENATOR PATRICK J. LEAHY

Senator **Leahy**. Thank you, Mr. Chairman. I compliment the Senator from Wyoming in giving his typically long, eminently quotable, and highly entertaining statement, but it was a statement to ask one question: Who appoints us to ask these questions? The answer of course is simple: the Constitution appoints us. And it is a constitutional duty that I think all of us, Republicans and Democrats, take very, very seriously.

We will in your hearing, as we did in the ongoing Justice Rehnquist matter, and I suspect that next month, and next year, and 10 years from now, and 30 years from now, and 100 years from now, the Senate Judiciary Committee will be doing it in further such hearings.

The Constitution requires it, we take an oath of office to uphold the Constitution, and I think each one of us will have to answer to ourselves, are we doing our best to uphold the Constitution, just as you take a similar oath. And I am sure you ask yourself the same questions every time you write a decision.

Senator Kennedy has commented that we want, indeed would like to have some time when we have an Irish nominee. I would say, Judge Scalia, my mother's family came here from Italy, and we are very, very proud of that. They came as stonecutters. My Italian ancestry is a source of pride to me, and it is a source of pride to my family.

I know how hard they worked as immigrants, stonecutters in Vermont. Ironically enough, my Irish grandfather was also a stonecutter in Vermont at the same time.

I would say also, welcome, to your children. I would assume, in reading Mrs. Scalia's maiden name, that your children have really the "best of all possible worlds"—an Italian parent and an Irish parent.

If you follow the tradition around here, whichever one of you reaches 34 first should be a Member of the U.S. Senate. That is the way it works in Vermont, and I would hope that it might work that well for you. I would also join with what Senator Metzenbaum said earlier. You also have young children, and I know it is a source of pride to you, and should be a source of pride to you to have all your children here, and I am sure it is a source of pride to them, to see their father nominated for what has to be one of the highest offices to be held in this land.

But none of us would take it amiss—and I direct this also to Mrs. Scalia—if any of the children get tired, and want a chance to go elsewhere—and I am sure that any one of the Senators on here would be willing to offer their office—I certainly would not mind—for a place for the children to take a break.

Just so that you will know, the areas—and you and I have discussed this before—but I will go into questions on your work as an Assistant Attorney General in the Office of Legal Counsel. We will probably be discussing your views on the Freedom of Information Act, and openness in Government.

Your philosophy about opening the Federal courts to litigants suing the Government, and especially with regard to interpretation of such a concept as standing and sovereign immunity, and the standards you would apply in recusing yourself from cases.

I too have been extremely impressed by your impressive background, scholastic background, just as I was impressed very much by the scholastic and academic background of Justice Rehnquist.

I think as you will find in these, that our questions will be pertinent, to the point, and I would assume that you see your meeting here as not stepping into a "pit," but rather, fulfilling one of the highest obligations under our Constitution, both for you and for us.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Alabama.

STATEMENT OF SENATOR JEREMIAH A. DENTON

Senator DENTON. Thank you, Mr. Chairman. Welcome, Judge Scalia. I will ask to include in the record, as if read, my rather extensive comments regarding the three criteria which I mentioned with respect to Justice Rehnquist; namely, those of Senator McClellan in which he asks about personal integrity, professional competency, and abiding fidelity to the Constitution. I will ask that the rather lengthy propounding of these qualities be included in the record, as if read.

The CHAIRMAN. Without objection, so ordered.

Senator DENTON. I congratulate you, Judge Scalia. You have said that the culmination of a dream for any attorney is to be appointed to the Supreme Court. I will not run through your qualifications, at length, but with respect to your integrity I would lean more toward a nuance of that, your personality, which I think will bear you in good stead here.

One rather liberal colleague on the circuit court characterized you as one who is, "fun to work with, who enjoys the dialog going back and forth". Good luck in the next few, or many hours.

Your intellectual capacity even as a young man in high school, far exceeded those around you, and one classmate commented that Antonin Scalia was so superior academically that his classmates just competed to be second.

He graduated magna cum laude from Harvard Law School; is highly recognized for vigorous and prolific writings; he is credited with 84 majority decisions written on the District of Columbia Circuit Court of Appeals; and has also written dozens of concurrences and dissents.

One comment I read, which I think will stand you in best stead here, stated: "On the bench, Judge Scalia has developed a reputation for meticulousness in preparation and ferocity in questioning." Presuming that ferocity in questioning also applies to answering, I think that will help you. One colleague characterized you by warning: "Pity the attorney who is not prepared. He is tough and formidable, and gives no quarter. He is fair and he's intelligent, but he's not deferential." That might be too harsh on you, but I think that that will stand you in good stead here, because I do not think you will be as meek and mild as some of the victims who have preceded you here.

I am particularly sensitive about one of those nominees. I would identify myself with the Senator from Wyoming, because I respect my colleagues, all of them. But I think that what has been done here lately, and rather obviously, conspicuously to the American public, is the use of a barrage of charges for partisan purposes, political purposes, to establish unjustified doubts among some very outstanding individuals nominated for Federal judgeships, the Supreme Court, or the Chief Justice of the Supreme Court.

We had ends justifying the means here. If their end is to perpetuate the kind of liberal judges who were appointed before President Reagan took over, I think they are flying in the face of the Reagan mandate in which the people of the United States very clearly expressed their misgivings as to the effect of those judges in overprotecting the victim—I mean overprotecting the offender and underprotecting the victim of crime, among other things that we could talk about.

But in the case of one after another, we had Fitzwater, we had Sessions, Manion, Rehnquist, and now you. We are seeing stonewalling. We are seeing, in the case of Sessions, the campaign begun in certain newspapers 9 months before it even got here, charges delivered the day before his hearings and ultimately the ironic result of a man being condemned for being a bad guy precisely for the very reason that he is a good guy. So it was unfortunate for our country, and for Alabama, that Mr. Sessions was not able, through me and others, to defend himself against that barrage, which effectively represented the weight of appalling charges exceeding the weight of attention given to the refutation of those charges.

I hope you do not suffer the same fate. I do not think you will suffer the same fate from the characteristics I have already mentioned. I believe that you will, on television, prohibit the disporting of you. I think you have enough toughness, enough intelligence, enough qualities that will not permit your being defeated here.

I think there will be national backlash, which will not be in the many powerful electronic and print media, which side with those who have the philosophies and ends in mind which some here do. They are entitled to those just as I am entitled to mine. But I believe there will be a backlash evident, perhaps during your own hearings, and I hope before the end of Justice Rehnquist's.

With those remarks, I am confident my colleagues will review carefully the excellent record of this candidate and I encourage them to join me in giving wholehearted support to his confirmation.

Thank you, Mr. Chairman.

[The prepared statement of Senator Denton follows:]

PREPARED STATEMENT OF SENATOR JEREMIAH DENTON

Today we are most fortunate to welcome before this Committee Judge Antonin Gregory Scalia, a man who has quickly distinguished himself as an outstanding legal scholar, a keen and precise intellect, and a vigorous and forceful author of court opinions and legal scholarship.

Judge Scalia, allow me to take this moment to extend my most hearty congratulations to you as we begin these confirmation hearings for your nomination to the highest court in the Nation. There is perhaps no greater honor in the legal profession than to be appointed to the Supreme Court. It is, as you have said, "the culmination of a dream" for any attorney.

Your nomination is also a credit to President Reagan, who has demonstrated a commitment to appointing formidable and capable jurists to the Nation's highest court.

Undoubtedly you had an opportunity to observe the long and arduous questioning which Justice Rehnquist underwent here last week. I have no doubt that you will also encounter similar rigorous questioning. I also have no doubt as to your ability to answer all questions with clarity and candor.

Mr. Chairman, as we welcomed Justice Rehnquist here last week, you might recall that I remembered the words of former Senator John L. McClellan of Arkansas. Senator McClellan spoke of three criteria by which Judicial nominees should be evaluated. These criteria were:

(1) Does a nominee have personal integrity?
(2) Does a nominee possess professional competency? and
(3) Does a nominee have an abiding fidelity to the Constitution?

Certainly it is proper that we ask the same of Judge Scalia as he makes his assent to become an Associate Justice of the Supreme Court.

In the realm of personal integrity, Judge Scalia is second to none. He is recognized on the District of Columbia Court of Appeals as a judge who eagerly seeks out the opinions and viewpoint of his fellow judges when he is formulating a position. Judge Scalia is one who is genuinely liked by his colleagues on the Court, whether of liberal or conservative bent, and is very effective at forging coalitions between those on all sides of the issue. One rather liberal colleague on the Circuit Court characterized Judge Scalia as one who is "fun to work with, (who) enjoys the dialogue going back and forth."

Judge Scalia's professional competency brings him high acclaim from other judges, practicing attorneys, and from those in academia. Even as a young man in high school, his intellectual capacity far exceeded those around him. One classmate commented that Antonin Scalia was so superior academically that his classmates competed to be second.

He has the great distinction of having graduated magna cum laude from Harvard University Law School, where he served on the Law Review. In six years of private law practice, Judge Scalia practiced real estate law, corporate financing, labor and anti-trust law. One colleague said of Judge Scalia's work as a practicing attorney * * * "he did everything * * * and he did it well. He was one of the last of the real generalists in the sense that he wanted to do as much of everything as he possibly could."

His distinguished career as an academician is also well known. He has served as a law professor at Georgetown University, the University of Chicago, and the University of Virginia. He was also a visiting professor at Stanford University.

Judge Scalia is highly recognized for his vigorous and prolific writing. His writing is said to have a "combination of commitment with vigor and an incisive, often wittily sarcastic, * * * style that will rally the troops even if it never commands a majority of the court." In his four years on the District of Columbia Circuit Court of Appeals, Judge Scalia has written eighty-four majority decisions and dozens of concurrences and dissents. Throughout his career he has written more than twenty articles for Law Reviews and other scholarly journals.

On the bench he has developed a reputation for meticulousness in preparation and ferocity in questioning. One colleague characterized Judge Scalia by warning: "Pity the attorney who's not prepared. He is tough and formidable and gives no quarter; he's fair and he's intelligent, but he's not deferential."

Finally, Mr. Chairman, Judge Scalia has demonstrated abiding fidelity to the Constitution and to precedent which has developed throughout our Nation's history. As a recognized authority on the balance of Constitutional power, he is credited with authoring the per curiam three judge opinion in *Synar* vs. *United States* invalidating the Gramm-Rudman provision which granted broad sequestration powers to the Comptroller General. He also filed a friend-of-the-court brief in the 1983 *Chada* case, in which the Supreme Court nullified the legislative veto. Judge Scalia's keen sense of administrative law, combined with his knowledge of balance of powers, will provide the Supreme Court with a fresh, incisive mind to grapple with the growing docket of cases involving administrative action and regulatory policy.

Mr. Chairman, Judge Scalia is highly qualified in those critical areas of personal integrity, high professional competency, and abiding fidelity to the Constitution and legal precedent. I encourage my colleagues to review carefully his excellent record in these three areas, and then join me in giving wholehearted support to his confirmation.

Thank you, Mr. Chairman.

The **Chairman**. The distinguished Senator from Alabama.

STATEMENT OF SENATOR HOWELL T. HEFLIN

Senator **Heflin**. Judge Scalia, I believe that almost every Senator that has an Italian-American connection has come forward to welcome you to this or to participate in this hearing thus far.

I would be remiss if I did not mention the fact that my great great grandfather [laughter] married a widow [laughter] who was married first to an Italian American. [Laughter.]

The **Chairman**. Let us get quiet.

Judge **Scalia**. Senator, I have been to Alabama several times too. [Laughter.]

Senator HEFLIN. So, Judge Scalia, it is with pride that I welcome you on behalf of the 4,022 Italian Americans in Alabama and the other 4 million people to this hearing. I also am delighted to welcome your wife and your nine children.

Looking at the number of your children, it appears that you have had much experience in working with groups of nine. However, nine is enough, at least for the U.S. Supreme Court Justices.

If confirmed, I hope your experience, family and otherwise, will help you to build a consensus when justice requires it, and to resolve the minor disputes which may arise on the Court.

I believe that there are two underlying questions to bear in mind throughout these proceedings. First, what is the role of a U.S. Senator in the confirmation process of a Supreme Court nominee? And, second, what qualifications should a nominee ideally possess in order to be confirmed?

In addressing the first question, there is no greater duty of the U.S. Senate than its confirmation of Supreme Court nominees. The Constitution states that the President "shall nominate and, by and with the advice and consent of the Senate, shall appoint * * * judges of the Supreme Court."

Many have looked to the past to determine the Senate's proper role in the confirmation process. Many look to present times to support the argument that all areas of inquiry are subject to Senate review. But when considering my role as a U.S. Senator to confirm or deny, I look to the future to see what this nominee will bring to the Court and whether the individual will be a vigorous enforcer of the cornerstone of individual liberty—the Constitution.

In my examination of a nominee to the U.S. Supreme Court, I am in agreement with the opinion of the late Senator John McClellan of Arkansas. He stated that: "there is room on the U.S. Supreme Court for liberals and conservatives, for Democrats and Republicans, of Northerners and Southerners, of Westerners and Easterners, of blacks and whites, and men and women—these and other factors should neither qualify nor disqualify a nominee."

To live under the American Constitution is the greatest personal privilege which was ever accorded any member of the human race. Therefore, I believe that the men and women to whom we entrust the care of our Constitution should be chosen with great care. In my opinion, only a handful of men and women are both qualified and capable of wearing the weighty robe of a Supreme Court Justice.

In each era, there arise particular threats to our constitutional democracy. Those whom we place on our highest tribunal must be able not only to meet these challenges but also, through their wise jurisprudence, to prepare for future challenges.

In order for a judge to accomplish these goals, I believe that a nominee should possess three criteria: First, an understanding of the proper role of the judiciary in our Constitution; second, a deep belief in and unfaltering support of an independent judiciary; and, third, an abiding love of justice.

Paraphrasing Tennyson, we are a part of all that we have met. If confirmed, you will bring to the Court a wealth of experience which will provide you with a solid foundation in your service to the people of this Nation and to the Constitution of the United States.

I understand that as a professor, you concluded your class each semester with a quotation from Robert Bolt. I think it is appropriate to cite another of Bolt's quotations here, "The law is not a 'light' for you or any man to see by; the law is not an instrument of any kind. The law is a causeway upon which so long as he keeps to it, a citizen may walk safely."

Judge Scalia, as a final arbiter of what the law is, keep that causeway forever straight, forever clear, and forever safe.

Good luck.

Senator SIMPSON [presiding]. Thank you, Senator Heflin.

And now I believe Senator Grassley, the Senator from Iowa, please.

STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. Thank you, Mr. Chairman.

First of all, let me personally congratulate you again, as I did in my office, on your nomination to serve on the Supreme Court.

By all accounts, you are an individual of great intellectual firepower, the energetic scholar, full of thoughtful as well as thought-provoking ideas.

Most recently, in your 4 years on the Court of Appeals for the D.C. Circuit, you authored more than 80 majority opinions and dozens of concurring and dissenting opinions.

Your colleagues on the D.C. circuit, it is my understanding, have found a most reasonable and fair judge, congenial and easy to work with. This is the view even among those with a different philosophy like Judge Wald and Judge Mikva.

It has been said that you especially enjoy the give and take of lawyerly dialog. This will make you well suited to the operation of the Court.

Before your appointment to the court of appeals, you proved to be a formidable legal scholar at both the University of Chicago and the American Enterprise Institute. You have had nearly two dozen articles published. I also note that you are the son of an Italian immigrant, and that has been played up, as it legitimately ought to, today. If confirmed, you will be the first Italian American to serve on the Supreme Court. Undoubtedly, this is a source of great pride in the Italian-American community, as it should be.

I believe it is further evidence of our truly pluralistic society. In sum, from what I know about your intellect, experience, and ability, it seems to me that President Reagan has made a wise choice.

Thank you, Mr. Chairman.

Senator SIMPSON. Thank you, Senator Grassley.

And now the Senator from Illinois, Senator Paul Simon.

STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. Thank you, Mr. Chairman.

First, if I may I would like to respond very briefly to my colleague from Alabama on the partisanship issue. I regret he is not here.

I do not think that the charge of excessive partisanship is a fair charge, frankly. Prior to the Supreme Court nominees, if my statistics are correct, 264 nominees appeared before this body. We have had roll calls on 4 of 264. And I might add that I voted with the President on one of those four where there were serious questions. The nominee who was held up longest from this administration was Judge Sporkin, held up by Senator Denton.

We welcome you here, Judge Scalia. Reference has been made frequently to your Italian heritage. But I think it is a healthy thing that the Supreme Court be a representative body. Just as when Justice Marshall was named, I think it was a healthy thing for our country. I welcome that. And there is no question of your ability to do the job.

I would like to follow up on a question which has been raised previously. Are we properly getting into views, or are we getting into things that we should not? Let me just read two paragraphs from a statement I made on the Senate floor in March:

> There are two fundamental reasons that nominees legal views should not be altogether off limits to the Senate. One is that just as we know that nominee's competence and integrity will affect his views as a judge, we know that the nominee's individual views about legal matters will in some measure affect decisions the nominee makes as a judge. The reason is that judges inevitably have leeway. They must fill in gaps in the law and must resolve ambiguities about what the law is, and in doing so, a judge inevitably draws upon his or her starting point views and outlook. This is true of all judges, and it is especially true of Supreme Court Justices whose leeway in giving meaning to the majestic general commands of the Constitution is particularly great. They must resolve conflicts among lower courts on a daily basis.
>
> The second reason a nominee's views may be relevant to the current Senate is that they were relevant to the President's own decision to nominate. As an active partner in the judicial appointment process, as the authority that must advise and consent to nominations in our systems of checks and balances, should the Senate evaluate any factor the President does? And if the President is trying to shape future judicial decisions by self-consciously nominating people with particular legal views, should the Senate, at least to some extent, consider whether those views are appropriate ones and good for the country?

I think that is our proper role, and I think Judge Scalia would agree that that is our role. I look forward to this process, and my impression is that you are going to come out of it well in terms of votes. But I think the process is an important one. And with all due respect to those who were critical of the hearings last week, I think they were healthy, good for the nominee, good for the Court, and good for our system.

I thank you, Mr. Chairman.

Senator **Simpson**. Thank you, Senator Simon.

And now Senator Arlen Specter of Pennsylvania.

STATEMENT OF SENATOR ARLEN SPECTER

Senator **Specter**. Thank you, Mr. Chairman.

Judge Scalia, I join my colleagues in welcoming you and your beautiful family to these proceedings.

The great thing about America is that it is a melting pot. I think it is about time that there was an American of Italian extraction sitting on the Court. In saying that, I do not want to express the final view, but what has been said here today has been very complimentary. Considering your outstanding record, even considering your law school was Harvard, you have brought an extraordinary record to this point in your life, I am especially pleased about the emphasis which is placed on the fact that you are the son of an immigrant, as am I, and I think that is one of the greatest things about this country; that the opportunity is unlimited.

I think one of the things that we have to do in Congress and on the Court is to provide opportunity for the future, and equal opportunity for all of the minorities that we focus on from time to time in these hearings.

I will have some questions about the authority of the Court and its jurisdiction, and the commitment, and the preeminence of the Court as the final decisionmaker in our society. It seems that we have 230 million people and 231 million ideas. I know that as a Senator from a State like Pennsylvania, which is really six States and includes 12 million constituents, there are many, many differences of opinion. Although the Senate votes many times, 2,400 times since I have been in this body, there has to be a final court which has jurisdiction, unquestioned authority, and the final word on the constitutional issues which is rockbed in our society.

When my time comes for the line of questions, that is the area of concern which I will address myself to. But I congratulate you for being here and the outstanding record that you bring to this point in your career.

Thank you, Mr. Chairman.

Senator SIMPSON. Thank you, Senator Specter. I believe that the opening statements have been completed by our colleagues.

Senator McCONNELL. I think not, Mr. Chairman.

Senator SIMPSON. On this side of the aisle, I am saying. Yes, yes. I realize there are more of us than there are of them. [Laughter.]

Senator KENNEDY. Tentatively.

Senator SIMPSON. Hopefully, for quite a while.

Senator McCONNELL. We like to keep it that way.

Senator SIMPSON. Senator McConnell from Kentucky. Mitch McConnell.

STATEMENT OF SENATOR MITCH McCONNELL

Senator McCONNELL. Thank you, Mr. Chairman. Judge Scalia, I too, want to congratulate you and your family. Our association, as you may recall, goes back to the days when we served together in the Justice Department during President Ford's administration, and I recall, at that time, everyone within the Department, without exception, felt that you were not only the brightest lawyer that we had, but had the best sense of humor.

And of course those were days when we needed a good sense of humor. I never will forget, one morning, at a staff meeting, we all had to suffer through the embarrassment of the morning Washington Post, which revealed, that on the day before, two illegal aliens had been arrested working for the Immigration and Naturalization Service. So, we had to maintain a good sense or humor, and you were clearly the one who made those meetings entertaining, as well as informative.

Much has been said about your nomination, and that of Justice Rehnquist, in terms of the philosophical balance on the Court. Since President Reagan announced his nominations of yourself, and Justice Rehnquist, the question has been what kind of impact is this going to have? I think it is important to ask whether judicial conservatism really means the same thing as political conservatism.

Judicial conservatism denotes a philosophy that treats the intent of the Constitution, the actual language of the Constitution and statutes, cautiously, and with respect, in short, strict construction. Judicial conservatism also encompasses a healthy regard for the doctrine of separation of powers. This conviction holds fast to the proposition, that the role of the judiciary, of the courts, is to merely interpret the law as written, and not to act as a superlegislature and substitute its own judgment, of social preference, for that of our duly elected representatives.

Judge Scalia has often pointed out that this philosophy does not necessarily advance a conservative political agenda. For example, writing early last year on the issue of judicial activism in the realm of economic rights, he observed, in a magazine article—and I quote you, Judge Scalia:

> Though it is something of an oversimplification, I do not think it unfair to say that this issue presents the moment of truth for many conservatives who have been criticizing the courts in recent years. They must decide whether they really believe, as they have been saying, that the courts are doing too much, or whether they are actually nursing only the less principled grievances, that the courts have not been doing what they want.

For Judge Scalia, it would appear that judicial conservatism speaks more to the judicial process than to the substantive political consequences of the Court's holdings.

Judicial conservatism is politically neutral. Judge Scalia has clearly demonstrated his adherence to this philosophy in practice. A cogent illustration is the recent holding, referred to earlier this morning, of the U.S. Court of Appeals for the District of Columbia Circuit in *Synar* v. *United States,* better known on the Hill as the Gramm-Rudman-Hollings case.

In an unsigned opinion generally attributed to Judge Scalia, the court voided the key provision of that law for being unconstitutionally violative of the doctrine of separation of powers. This holding came as a blow to political conservatives interested in effectively reigning in a runaway deficit. Yet there was no hesitation on the part of Judge Scalia to strike it down. So, too, does Judge Scalia's judicial conservatism make him an opponent of the legislative veto, another pet project of political conservatives.

Judicial conservatism hinges upon a tight and principled reading of the Constitution, and does not turn on political considerations. It rejects judicial activism, either of the left or of the right, as constitutionally repugnant.

Mr. Chairman, that leads to one additional issue that I believe ought to be put to rest. It has been asserted dogmatically by members of this committee, and certain sectors of the media, that candidates such as Justice Rehnquist and Judge Scalia are too extreme in their judicial philosophy. That they are far removed from the mainstream of contemporary judicial thought.

Such characterizations, to be blunt, are nonsense. Main Street America has spoken clearly and unequivocally throughout the decade of the 1980's in articulating a new set of priorities for this Nation.

Part of the mandate that the citizens of 49 of these United States entrusted to President Ronald Reagan has been to rein in the extreme activism of our Federal judiciary. The President, in nominating Judge Scalia, is carrying out that mandate. I would respectfully submit that those who maintain that the President's nominees are outcasts from the mainstream of contemporary judicial thought are themselves so far adrift on the fringes that they have lost contact with the prevailing currents of American society—Judge Scalia's credentials and qualifications place him square on the crest of this new wave.

Mr. Chairman, last week I set forward the five criteria that I believe should be weighed by Members of the Senate in carrying out their constitutional duty to advise and consent in the matter of the nomination of a Supreme Court Justice.

I will not go through those elements in detail today. I would like to go on record, however, in stating, that based upon his competence, professional achievement, a judicial temperament that places a premium on fairness, courtesy, and congeniality, and just as important, his personal and professional integrity and high ethical standards, Judge Scalia is set apart as being among the most distinguished and eminently qualified individuals ever to aspire to sit on the highest Court of this land.

Judge Scalia has not only shown himself to be academically and professionally "a lawyer's lawyer," but "a judge's judge" as well. He is highly regarded among his peers as an exceptional judicial craftsman, skilled in the arcane art of cogently drafting judicial opinions. It is this ability, no less so than his other ample qualifications, that distinguishes him from his peers, and establishes him as uniquely fit to serve on the Supreme Court. It is this talent that lends practical substance to his abilities, permitting his colleagues on the lower courts to clearly carry out the edicts of the Supreme Court. It makes him a leader.

Thus, without reservation, I can confidently go on record today as supporting the confirmation of Judge Scalia. I hope this committee will act favorably and act quickly on your nomination.

Congratulations, again.

The **Chairman**. The distinguished Senator from North Carolina.

STATEMENT OF SENATOR JAMES T. BROYHILL

Senator **Broyhill**. I thank the Chairman, and I want to welcome Judge Scalia to the committee. I have received a number of comments in my office with respect to your nomination by the President.

The comments that I have received note that you are highly intelligent, well prepared, and congenial. Of course, they also praise your ability to articulate your views with respect to the legal issues which are brought before you.

I note that in your legal career you have served in a number of capacities. You have served on the faculty of at least four law schools. You have served in the Justice Department as well as in private law practice. Of course, as a result you have come into contact with many, many attorneys from around the Nation. And generally, I find that you are highly regarded in the bar.

In short, you are a well qualified professional. Of course, we are going to have a long line of witnesses here who will be giving their views with respect to your nomination.

I find a great number of these individuals and organizations are going to support you, and in fact you have been given the highest evaluation by the American Bar Association which has conducted an exhaustive investigation of your background.

But there will also be a parade of witnesses who will come before us who will disagree with you. I have found, already, in looking at some of these comments, that they say you are closeminded. Apparently, they are assuming that because you are able to study the facts that are brought to your attention, and come to a firm conclusion that may not agree with theirs, that somehow your conclusion is faulty.

I do not agree with that assessment. I admire your professional, your academic, and your personal qualifications. I think that you will bring to the Court a strong voice for reason. I think that the President is making an excellent choice, and applaud that choice.

Thank you very much.

The CHAIRMAN. Judge Scalia, we will take you as the first witness after the recess. All of the members now have made statements, so we will go into your testimony, and, we are going to recess now until 1:45. That is 1 hour and 15 minutes.

[Whereupon, at 12:30 p.m., the committee recessed for lunch, to reconvene at 1:45 p.m.]

[The following was received for the record:]

ANTONIN SCALIA

1. Birth: Born March 11, 1936, in Trenton, New Jersey.
2. Marriage: Married to Maureen McCarthy, Sept. 10, 1960; nine children (Ann Forrest, Eugene, John Francis, Catherine Elisabeth, Mary Clare, Paul David, Matthew, Christopher James, and Margaret Jane).
3. Education: Georgetown University and University of Fribourg (Switzerland), A.B., 1957; Harvard Law School, LL.B., 1960; Harvard Law Review; Sheldon Fellow, Harvard University, 1960-61.
4. Bar: Admitted to practice in Ohio (1962) and Virginia (1970).
5. Experience: In private practice with Jones, Day, Cockley & Reavis, Cleveland, Ohio, 1961-67; professor of law, University of Virginia Law School, 1967-74 (on leave 1971-74); General Counsel, Office of Telecommunications Policy, Executive Office of the President, 1971-72; Chairman, Administrative Conference of the United States, 1972-74; Assistant Attorney General, Office of Legal Counsel; Department of Justice, 1974-77; scholar in residence, American Enterprise Institute, 1977; visiting professor of law, Georgetown University, 1977; professor of law, University of Chicago, 1977-82; visiting professor of law, Stanford University, 1980-81; editor, Regulation Magazine, 1979-82; chairman, ABA Section of Administrative Law, 1981-82; chairman, ABA Conference of Section Chairman, 1982-83; board of visitors, J. Reuben Clark Law School, Brigham Young University, 1978-81; nominated by President Reagan to U.S. Court of Appeals for the District of Columbia Circuit July 15, 1982, confirmed August 5, 1982, took oath and assumed duties August 17, 1982.

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

Judge Scalia, if you will come around, please. Hold up your hand and be sworn.

Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **Scalia**. It will.

The **Chairman**. Have a seat.

TESTIMONY OF HON. ANTONIN SCALIA, TO BE U.S. SUPREME COURT JUSTICE

The **Chairman**. Would you like to introduce your family? You have got a lot of children there, and they may want to——

Judge **Scalia**. I would, Senator. They have taken a lot of trouble to get dressed up and come downtown. I think the little ones will probably want to leave after the first recess, but I did want to give them their moment in the limelight here, if I can remember all the names. [Laughter.]

The **Chairman**. They are like old friends; you see them all over there. You have nine children. I believe you have eight of them here, don't you?

Judge **Scalia**. I think all nine are here, Senator. I think we have a full committee.

My wife, Maureen, is at the right in the front row. Next to her is Meg. Her real name is Margaret but she said I should introduce her as Meg because when she is called Margaret, she is usually in trouble. Catherine, Christopher, Matthew. And in the next row, from the other end, Mary, and my oldest, Ann, Eugene, John, Paul, and that is it.

The **Chairman**. You have a good memory.

Judge **Scalia**. But do not try me on the ages Senator.

I would also like to introduce, behind me, my law clerk, Patrick Schiltz who has helped me in getting together the materials I will probably need for this hearing.

The **Chairman**. Judge, do you care to say anything before we begin questioning? Do you have an opening statement you would like to make?

Judge **Scalia**. No, I do not, Senator, except to express my honor at being nominated by the President, and the fact that I am happy to be here and look forward to answering the committee's questions.

The **Chairman**. Now I believe Senator Biden suggested we have 20 minutes for the opening round, until we get around, and then, if we have a second round, it will be 10 minutes from then on. The same way we did it in the Rehnquist hearing.

Senator Grassley, did you ever make an opening statement?

Senator **Grassley**. Yes, sir. I did.

The **Chairman**. Thank you. Judge Scalia, there are some very obvious differences in the roles of a circuit court of appeals judge and an Associate Justice of the Supreme Court.

The most glaring difference, I suppose, is that the Supreme Court has the final word on what the law is. It is the final ruling in the appeals ladder, and can be overruled on constitutional interpretations, only by a later Supreme Court decision or by constitutional amendment.

What do you view as other major differences in the role of a circuit court judge and an Associate Justice?

Judge SCALIA. Well, I think you have correctly identified the major one, that there is no one to correct your mistakes when you are up there, except the constitutional amendment process.

In a way, there is a lesser body of law to look to. As a circuit judge, I accept as precedent not just the opinions of the Supreme Court, of course, but the earlier opinions of my own circuit, and accept as very persuasive the opinions of other circuits. So it is a much vaster body of law that I have to consult in order to make my decisions.

At the Supreme Court level, the most persuasive precedent is just Supreme Court precedent, although, to some extent, lower court opinions are looked to, but that body of precedent is not nearly as important.

I think you have put your finger on what the main difference is, and that is that at the circuit court level, the opinions of the Supreme Court are the last word, and we follow them unwaveringly.

At the Supreme Court that is not quite the situation as the Supreme Court is bound to its earlier decisions by the doctrine of stare decisis in which I strongly believe.

Other than that, I suppose it is more difficult to be sitting in a panel of nine judges all the time. On my circuit court we now have 11, and when we sit en banc it is a much more ponderous group to bring to a consensus than is a panel of three, which is the normal panel. I expect that that would be quite a difference.

The CHAIRMAN. Judge Scalia, as we rapidly approach the 200th anniversary of the Constitution of the United States, many Americans have begun to express their views about the reasons for the amazing endurance of that great document.

Would you please share with the committee any views you may have regarding the success of the Constitution, and its accomplishment of being the oldest existing Constitution in the world today.

Judge SCALIA. I will be happy to. I think a lot of Americans do not realize what a——

The CHAIRMAN. Now you do not have to go into the whole history of it.

Judge SCALIA. I will not do it. I will not do it. [Laughter.]

I think most of the questions today will probably be about that portion of the Constitution that is called the Bill of Rights, which is a very important part of it, of course. But if you had to put your finger on what has made our Constitution so enduring, I think it is the original document before the amendments were added.

Because the amendments, by themselves, do not do anything. The Russian constitution probably has better, or at least as good guarantees of personal freedom as our document does. What makes it work, what assures that those words are not just hollow promises, is the structure of government that the original Constitution established, the checks and balances among the three branches, in particular, so that no one of them is able to "run roughshod" over the liberties of the people as those liberties are described in the Bill of Rights.

If I had to put my finger on what it was that has made the difference, that is it.

The CHAIRMAN. Judge Scalia, under the Constitution, certain functions are reserved to the Federal Government and others to the States, or rather, they have been delegated to the Federal Government, and others reserved to the States.

Would you describe, in a general way, your view of the proper relationship between Federal and State law.

Judge SCALIA. The proper relationship of course is that Federal law is supreme. If the Federal Government acts in a field over which it has authority, State law has to step back.

When that should happen, of course, is most often a question of prudence and that means that it is most often a question for this body to decide, when it wishes to displace State law, and when not. When it does so, that is the end of the matter.

The CHAIRMAN. Judge Scalia, since the announcement of your nomination to be an Associate Justice of the Supreme Court, you have been criticized by some for decisions you have rendered regarding the first amendment and libel. Would you please give the committee your view as to why your interpretation of the first amendment, with regard to libel, led to this criticism.

Judge SCALIA. Well, I have to say it must have been misunderstanding, Senator. I do not know of anything in my opinions, or my writings, that would display anything other than a high regard, and a desire to implement to the utmost the requirements of the first amendment.

As a matter of fact, as Senator Moynihan mentioned this morning, I am the first academic to be nominated to the Court since Frankfurter. I have spent my life in the field that the first amendment is most designed to protect. In addition to having been a scholar, and a writer as a scholar, I think I am one of the few Supreme Court nominees that has been the editor of a magazine.

So why anyone would think that I—if anything—if I were to have a skewed view of the first amendment, Senator, it would be in just the opposite direction.

The CHAIRMAN. Judge Scalia, the Supreme Court's decision in *Marbury* v. *Madison* is viewed as the basis of the Supreme Court's authority to interpret the Constitution and issue decisions which are binding on both the executive and legislative branches.

Do you agree that *Marbury* requires the President and the Congress to always adhere to the Court's interpretation of the Constitution?

Judge SCALIA. Well, *Marbury* is of course one of the great pillars of American law. It is the beginning of the Supreme Court as the interpreter of the Constitution. I hesitate to answer, and indeed think I should not answer the precise question you ask—do I agree that *Marbury* v. *Madison* means that in no instance can either of the other branches call into question the action of the Supreme Court.

As I say, *Marbury* v. *Madison* is one of the pillars of the Constitution. To the extent that you think a nominee would be so foolish, or so extreme as to kick over one of the pillars of the Constitution, I suppose you should not confirm him. But I do not think I should answer questions regarding any specific Supreme Court opinion, even one as fundamental as *Marbury* v. *Madison*.

If you could conclude from anything I have written, or anything I have said, that I would ignore *Marbury* v. *Madison*, I would too be in trouble, without your asking me specifically my views on *Marbury* v. *Madison*.

The CHAIRMAN. Judge Scalia, 20 years have passed since the *Miranda* v. *Arizona* decision which defined the parameters of police conduct when interrogating suspects in custody.

Since this decision the Supreme Court has limited the scope of *Miranda* violations in some cases.

Do you feel that the efforts and comments of top law enforcement officers throughout the country have had any effects on the Court's views, and what is your general view concerning the warning this decision requires?

Now I want to make this statement: Any question that is asked about decisions of the Court, if you prefer not to answer them, if you will say so.

Judge SCALIA. No; I do not——

The CHAIRMAN. Anything that may come before the Court, I do not want you to feel obligation to answer.

Judge SCALIA. As to the second part, Senator, what do I think of those warnings, I am happy to answer it as a policy matter, assuming the questions is not, you know, what do I think as to the extent to which those warnings, in one circumstance or another, are required by the Constitution.

As a policy matter, I think—as far as I know, everybody thinks—it is a good idea to warn a suspect of his rights as soon as it is practicable. I do not know of anyone who thinks it should be otherwise.

As soon as the suspect is brought within the control of the police, he should have knowledge what his rights are, as a policy matter.

The other part of your question, if I recall, was do I think the Supreme Court has been influenced by the views of police officers and law enforcement officials. I suppose—I do not think the Supreme Court lives in a vacuum. It reads the newspapers. I suppose it is influenced by the reaction of a society to its decisions; at least I hope it is. I think it should be.

One would not know whether one's decisions are doing good or bad unless one consulted the effect of them.

The CHAIRMAN. Judge Scalia, in 1972 the Supreme Court, in *Furman* v. *Georgia,* struck down the death penalty provisions in Federal and State law on the basis that under the statutes the death penalty could be imposed in an arbitrary and capricious manner.

In 1976, the Supreme Court, in a series of cases beginning with *Gregg* v. *Georgia,* held that the death penalty was constitutional when imposed under certain procedures and criteria.

In the years subsequent to these decisions, the Supreme Court has reviewed many challenges to death penalty statutes.

Do you feel that the Supreme Court now provides sufficient guidance in this area?

Judge SCALIA. Whether it provided sufficient guidance, I am not sure I have the data that I would need in order to answer that question.

It is always a difficult problem. One of the hardest problems, I think, for an appellate judge is how broadly one wants to write an opinion. Certainly, providing guidance is one of the purposes of an appellate opinion. So you can write an opinion very broadly, which will answer all the questions for the next 50 years, or you can write it very narrowly, and just answer this particular case, and let the next one come up when it does.

It is a hard call as to how far you go in one direction or another. I really do not know whether the Supreme Court has been as informative as it could be or should be.

I have to say, not having been there, I am sure they did what they thought was best.

The CHAIRMAN. Judge Scalia, there are approximately 1,300 inmates under death sentences across this country. Many have been on death row now for several years as a result of the endless appeals process.

Would you favor some limitation on the extent of the number of post-trial appeals which allow inmates under death sentences to avoid executions for years after the commission of their crimes?

Judge SCALIA. Well, Senator, nobody likes frivolous appeals, I suppose, in any matter, criminal or civil. But to the extent that your question is asking about legislation, I should not have a view about it. And to the extent that it is asking whether the Supreme Court ought to change its view of what the law requires to provide fewer appeals, I ultimately will have to have an opinion about it, but should not set it forth here.

The CHAIRMAN. Judge Scalia, in the last several decades we have seen a steady increase in the number of regulatory agencies which decide a variety of administrative cases.

I realize that the scope of judicial review of these administrative cases vary from statute to statute. However, as a general rule, do you believe that there is adequate opportunity today for appeal of administrative decisions to the Federal courts, and do you feel that the standard of review for such appeals is appropriate?

Again, I remind you, anything that you feel that you should not answer, any matter that you feel will come before the Court——

Judge SCALIA. No; I do not think that will—I mean, appropriate. I assume you are saying, appropriate. Congress can alter the standard of review considerably.

I am not aware of any great dissatisfaction in the administrative law community. And I think I am fairly familiar with that community, having been a denizen of it for a number of years.

I do not know that there is any great dissatisfaction with the general scope of review of administrative action that now exists, which essentially is an arbitrary and capricious standard. The fine call is for the agency. And the courts look it over to see that it has not been so unreasonable as to be arbitrary or capricious.

As far as I know, it seems to have worked pretty well.

As to whether there is review in enough cases, and there should be review in more cases or in fewer cases, that is really a call for the Congress on which I do not have any particular, special views.

The CHAIRMAN. Judge Scalia, a concern has been expressed with respect to the bureaucracy of the Federal courts; the increase in clerks and support staff; and the supposed insulation of judges from personal decisionmaking.

At the same time, the workload, the increase in complicated cases which raised technical and scientific issues, and other highly specialized disciplinary matters suggest that judges and justices need more and more specialized assistance.

Do you think that in addition to law clerks the Supreme Court needs to appoint clerks or assistants with particular scientific or professional expertise, or is the solution to take certain issues involving science and other abstruse areas out of the courts altogether?

Or is it some other solution?

Judge Scalia. No; I think you have them there, Senator.

Personally, and I guess you—no, I do not think you would get as many answers as you asked judges—personally I would not want a scientific expert on my staff. Institutions tend to do what you give them the capability to do. And if you give courts scientifically expert staff, they are going to become bodies that inquire into the scientific rights and wrongs of particular decisions.

And simply the way our system is set up, those scientific judgments have been left to the Congress to make when it passes legislation, and to the Executive to make, to an even greater degree, by delegation from the Congress.

As I said earlier with reference to your question on the standard of review, all the courts are there for is to see whether the agency has followed the proper procedures, which is critically important, and whether in the final judgment the agency reaches, the agency has been within the bounds of reason.

I think I can tell, without a scientific expert, just on the basis of the record in the case, whether it is in the bounds of reason. And I personally would not want the courts to go any further than that, or you are just duplicating the work of administrative agencies.

The Chairman. Judge Scalia, do you believe that the Court has given sufficient consideration to a relevant economic analysis in evaluating the effects of restraints of trade, and are you satisfied with the guidance that the Court has provided on the proper role of economic analysis in antitrust law?

Judge Scalia. Senator, antitrust law has never been one of my fields. Indeed, in law school, I never understood it. I later found out, in reading the writings of those who now do understand it, that I should not have understood it because it did not make any sense then.

As to whether the Court has—so I really am in no position. All I can tell you is hearsay, Senator, from those who follow the field. I do understand that the rules have changed in recent years, and that the Court is applying the principles and the data that economists have accumulated over the years regarding the sensible application of the antitrust laws.

But I have not had a single antitrust case since I have been on the D.C. Circuit. And I have not complained about that, either.

The Chairman. Judge Scalia, Chief Justice Burger and others have complained about the poor quality of advocacy before the Nation's courts, including advocacy before the Supreme Court.

Do you feel that legal representation is poor, and if so, what in your opinion should be done to improve the quality of this representation?

Judge Scalia. Senator, I can only speak from my own court. And before my court, it is excellent. I cannot speak highly enough about the bar that practices before me. I think there is an enormous proportion of highly competent lawyers who do fine work not only for their client but for the court in informing us of the issues of law that we have to decide.

On the basis of what I see before my court, which is maybe not a typical court, the advocacy is good.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Thank you, Mr. Chairman.

Our ranking Member, Senator Biden, is currently on the floor with the introduction of legislation dealing with drug regulation, and he will be over here very shortly. But I will proceed, if I might.

Judge Scalia, if you were confirmed, do you expect to overrule the *Roe* v. *Wade?*

Judge SCALIA. Excuse me?

Senator KENNEDY. Do you expect to overrule the *Roe* v. *Wade* Supreme Court decision if you are confirmed?

Judge SCALIA. Senator, I do not think it would be proper for me to answer that question.

The CHAIRMAN. I agree with you. I do not think it is proper to ask any question that he has to act on or may have to act on.

Judge SCALIA. I mean, if I can say why. Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.

Senator KENNEDY. There have been at least some reports that that was one of the considerations in your nomination. There are a lot of other, clearly, strengths which you bring to your own qualifications. But I am interested in what precedence you put on that decision being on the lawbooks. I am interested in your own concept in stare decisis. Do you believe in it? What is it going to take to overrule an existing Supreme Court decision?

Judge SCALIA. As you know, Senator, they are sometimes overruled.

Senator KENNEDY. I am interested in your view.

Judge SCALIA. My view is that they are sometimes overruled. And I think that——

Senator KENNEDY. But what weight do you give them?

Judge SCALIA [continuing]. I will not say that I will never overrule prior Supreme Court precedent.

Senator KENNEDY. Well, what weight do you give the precedents of the Supreme Court? Are they given any weight? Are they given some weight? Are they given a lot of weight? Or does it depend on your view——

Judge SCALIA. It does not depend on my view. It depends on the nature of the precedent, the nature of the issue.

Let us assume that somebody runs in from Princeton University, and on the basis of the latest historical research, he or she has discovered a lost document which shows that it was never intended that the Supreme Court should have the authority to declare a statute unconstitutional. I would not necessarily reverse *Marbury* v. *Madison* on the basis of something like that.

To some extent, Government even at the Supreme Court level is a practical exercise. There are some things that are done, and when they are done, they are done and you move on. Now, which of those you think are so woven in the fabric of law that mistakes made are too late to correct, and which are not, that is a difficult question to answer. It can only be answered in the context of a particular case, and I do not think that I should answer anything in the context of a particular case.

Senator KENNEDY. Well, do I understand that your answer with regard to Supreme Court decisions is that some of them are more powerful, more significant, than others in terms of how you would view in overruling them or overturning them?

Judge SCALIA. Yes, I think so, Senator. May I supplement——

Senator KENNEDY. And you are not prepared on this issue to say where that decision comes out, as I understand it?

Judge SCALIA. That is right, Senator. And maybe I can be a little more forthcoming in response to your first question.

As you followed it up, you said that some thought that that is why I was going onto the Court.

I assure you, I have no agenda. I am not going onto the Court with a list of things that I want to do. My only agenda is to be a good judge. I decide the cases brought before me. And I try to decide them according to the law as best as I can figure it out. But it is not a programmatic matter, as far as I am concerned.

Senator KENNEDY. Well, that is part of this whole process, giving you an opportunity to speak to those questions. But it is also part of this process to find out what kind of relevancy you give to previous Court decisions, and how significant they are in terms of your own legal experience, and when they might be overturned and when they might not be.

And as I gather from your answer, that is kind of a variable, that some have stronger standing than others, and that that is your view. But in terms of that particular view, you are not prepared to indicate, at least in that case, in the *Roe* v. *Wade* case, where you come out, as to whether you feel that that is a strong precedent or a weak precedent.

But evidently you believe that some precedents are weaker and some are stronger in the doctrine of stare decisis.

Judge SCALIA. That is right, sir. And nobody arguing that case before me should think that he is arguing to somebody who has his mind made up either way.

Senator KENNEDY. Well, then, what is the relevance of the previous decision? Does that have any weight in your mind?

Judge SCALIA. Of course.

Senator KENNEDY. Well, could you tell us how much?

Judge SCALIA. That is the question you asked earlier, Senator. And that is precisely the question——

Senator KENNEDY. I know it.

Well, let me go to another kind of question. You talked about overruling precedents, and that evidently some have a greater weight than others.

I think all of us, certainly here, are familiar with the decision of the Court in the Gramm-Rudman case. We are also less familiar, but increasingly more familiar, of the decision in the district court.

Some have suggested that you might have been the author of the opinion.

Whatever that might be, there is a clear indication about questioning the roles of the independent agencies, and the allocation of certain Executive powers to those independent agencies.

This was I think probably decided in 1935 as to uphold their constitutionality, and I think maybe you would want to comment whether this decision in the district court, how it really fits in to that particular holding about the allocations and the authority of the independent agencies.

Judge **Scalia**. I do not think it affects it at all, Senator. The three-judge district court decision in *Synar* decided the case on the assumption that the decision in Humphreys Executor permitted the prohibition by Congress of Presidential removal, except for cause. It was done on that assumption.

Senator **Kennedy**. Well, there I think will be an opportunity at greater length to go into that particular decision and to try and draw out what the courts are really saying about the continued strength of the independent agencies in terms of their constitutional standing.

Judge **Scalia**. Senator——

Senator **Kennedy**. OK.

Judge **Scalia** [continuing]. Before that happens, let me tell you a problem I have discussing it even generally, not in the context of a particular Supreme Court case—we have pending, not in the Supreme Court, but before the court that I am now sitting on, so it will be a problem for me whether I am confirmed by the Senate or not—we have pending before us a suit challenging precisely the constitutionality of the restrictions on removal of the Federal Trade Commission. So I am very much constrained about speaking to that.

Senator **Kennedy**. Well, let me back up a little bit because I am more concerned about your approach to these issues.

We have seen rather strenuous action in the Congress over the period of 30 or 50 years in terms of creating a safe workplace for the American worker. The Congress addressed the whole abuses in the child labor laws. We have tried to address the issues in terms of sweatshops, other areas where there has been very significant exploitation of the American worker.

One of the newer areas where the Congress has addressed is on the issue of occupational health and safety. This is an area in which the Congress has spoken very clearly. Nonetheless, very few of us in the Senate—I do not think any now, we did have some—are doctors. These are complex issues. And if it is the decision of the Congress and the Senate that these kinds of decisions are going to be relinquished to an independent agency to attempt to provide for what is a congressional responsibility in terms of the protection of the workplace and that we are going to give that function to an agency that will draft various rules and regulations, I am interested in how troubled you are about it, because I have reference to an article that you wrote a note from the benzene case in which Judge

Rehnquist had a dissenting comment, and in which you also expressed a view, which I would think, if it became a majority position, certainly with regards to the occupational health and safety vision, would probably mean that that particular agency would be effectively eliminated.

I am interested in your comments whether or——

Judge SCALIA. You are asking now not about the removal of power but about excessive delegation?

Senator KENNEDY. Yes. Exactly, exactly.

And if I could just add to that. One of the points that you raised is the question of vagueness in terms of the drafting of various statutes.

I was just interested as a legislator trying to find out where we are going, quite frankly with you, Mr. Justice, but also, as someone who has spent a good deal of time, know that certain language has to be vague in order to permit decisions by, say, medical personnel to be able to draft certain flexibility. Hopefully they are not vague, but they provide a degree of flexibility in order to get the job done.

And I am just wondering what message we ought to have in terms of the future if we are going to run into problems with this.

Judge SCALIA. Well, again, I am reluctant to talk about what Scalia will say in the future. I can talk about what he said in the past, and I think you have me on the wrong side on the matter——

Senator KENNEDY. That is good. Help me out.

Judge SCALIA [continuing]. Of broad delegation.

The fact is, in the *Synar* case that we were discussing earlier, the principal attack on the legislation was that it was unconstitutional because of the excessiveness of the delegation. And the three judges of the district court on which I sat rejected that argument. It did not sustain it.

The article that you have there, which is an article from Regulation magazine, that I used to be editor of at one period, I do not think—I think you read it incorrectly if you view it as an attack on the constitutionality of broad delegation. To the contrary, I think, if I recollect the article you are referring to correctly, it displayed quite the opposite view, that it is very difficult for the courts to say how much delegation is too much. It is a very, very difficult question, and I think it expressed the view that, in most cases, the courts are just going to have to leave that constitutional issue to be resolved by the Congress. Congress has an obligation to follow the Constitution as well.

Senator KENNEDY. Well, would I be correct in saying that you would support then a broad congressional mandate in these areas?

Judge SCALIA. I would support a broad congressional mandate that is not unconstitutionally overbroad, yes. [Laughter.]

Senator KENNEDY. The point that——

Judge SCALIA. But, seriously, I am not trying to go around and around. I think I am accurate in saying that my writings do not show that I am likely to be more restrictive on that matter than others.

Senator KENNEDY. I may not assume correctly that in reviewing some of these cases and the articles, that you require a degree of specificity in terms of the legislation, and the opinion that you are not going to breathe life into the words or language of various acts.

And there is a whole series of different references I could read, and I do not want to, I do not want to take the time.

That is what I am concerned about. And I am interested in whatever response you could give. You know the point I am driving at.

Judge SCALIA. I think I know——

Senator KENNEDY. I do not want to—I speak to delegation, but I am talking about specificity in areas which I think the Congress has acted in terms of the protection of the elderly and in terms of the protection of health and safety, and a whole wide range of areas of protections in health and safety. And I am just interested in not only the constitutional question of the allocation of powers, but also the specificity that you require in order to permit these to be upheld.

Judge SCALIA. Senator, I think again—I think you have me wrong. I have criticized, and I think I have often said in my writings and in my speeches that Congress should be more specific; that the more specific Congress can be, the more democratic the judgment is, because if Congress is not specific, the judgment is made by the courts, and the courts are not democratic institutions.

So I have criticized what seemed to me as a policy matter the overgenerality of the statutes. But the reason I criticize them is precisely because even though they are overgeneral, they will, by and large, be upheld and implemented by the courts. And the courts will determine what they mean. I do not think that that is ordinarily the better way to do it to the extent that Congress has the time, and I know that is a problem.

The import of my earlier writings was that Congress ought to try to be more specific. But that does not speak, Senator, to whether if it chooses not to be more specific, the law will be unconstitutional.

Senator KENNEDY. That is helpful.

In an earlier response to the chairman's questions on the free speech, on the *Ollman* v. *Evans*, and your dissent.

Your conservative colleague, Judge Bork, evidently criticized your dissent, noting that you were—I think he mentioned advocating your judicial function by your view of free speech.

How do you respond to what Judge Bork said?

Judge SCALIA. Well, I guess I would respond that my dissent was joined by my liberal colleagues, Judge Wald and Judge Edwards. I leave it there.

Senator KENNEDY. You had in an area that this committee is interested in, and that is the question of executive privilege, being able to obtain certain documents.

I noticed in your exchange with Senator Muskie you were talking about—this time they were talking about the *Nixon* case. And Senator Muskie concluded in his question, then, in your judgment, the right of the Congress to military and diplomatic secrets stand at a lower level than the right of the President to withhold those secrets, as a question And you said "No, sir." And then you continued along, "I don't mean to denigrate the congressional"—I will include it all in the record, Mr. Chairman, if I may, that statement.

[Not available at press time.]

Senator KENNEDY [reading]:

> I don't mean to denigrate the congressional power. They both, the Congress and the Executive have the right to assert their prerogatives. When it comes to an im-

passe, the Congress has means at its disposal to have its will prevail. The means are indicated in my testimony. The most effective is the withholding of funds from the Executive. The refusal to confirm Presidential nominees was also used several times under President Nixon, if I recall, to elicit information which had been previously denied. The Senate simply would not confirm nominees until the information was turned over.

I wonder if you still affirm that wonderful judicious statement and comment that is based upon all the excellent reviews that have been given to you? I imagine you still want to hold to that?

Judge SCALIA. It is true, Senator. How can I withdraw from it?

Senator KENNEDY. I do not know whether I should ask you whether you want to expand on that or not, whether I——

Judge SCALIA. It is one of the means that the Congress has at its disposal.

Senator KENNEDY. In another area, Judge Scalia, this is on the questions of the national security and individual rights.

We have gone through a rather important period in past history, in the early seventies, where we were trying to balance national security interests against the first amendment, and we have seen—recent history has taught us to scrutinize the claims of the executive branch in the possibility of inhibiting free speech and association of press and right of dissent under the names of national security.

And I just was interested in hearing your own attitude how you as an individual viewed their role, whether you view the role as an umpire in our federal system with a competing first amendment—between the first amendment and national security claims, or are you going to give the complete basic and overwhelming presumption to those who make the claim, or are you going to examine in some detail the background for such a claim, or how you will approach the issue generally?

Judge SCALIA. Well, I will certainly approach it with an awareness of the importance of both of the elements that are in contention there, of the first amendment as of normal importance in the ability of the people to speak, to learn and, on the other hand, the national security interest is often of great importance.

That is the worst problem about being a judge. It is never something on one side. I mean you can be criticized for coming out against the first amendment, and one never hears what is on the other side of that case. There is always some important interest on the other side or it would not be a case.

I cannot be any more specific in response to your question except to say that I am seriously interested in both of the principles, both of the concerns that arise in those cases. I am aware of the importance of the first amendment, and will give it the full weight that the Constitution accords it.

Senator KENNEDY. The reason I bring that up is because when it was alleged in charge for national security reasons, we found the gross abuse of all these individual rights and preassembly during another period, the early period of the 1970's where we had extensive unauthorized unconstitutional wiretapping, of mass surveillance, questions of first amendment rights.

I hear my time is up. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The distinguished Senator from Maryland.

Senator MATHIAS. Thank you, Mr. Chairman.

Judge Scalia, as you well know, one of the special qualities a judge must have is the ability to put aside very deeply held personal beliefs in order to apply the law and the Constitution fairly and equitably to every litigant who stands before him.

Your exchange with Senator Kennedy on the subject of *Roe* v. *Wade* suggests an area where you have written—and I am not trying now to lead you down the pathways of the future. We will look back to the road of the past.

You have written on the subject of *Roe* v. *Wade,* and while I do not pretend to be an expert on every word you have written, I believe you have expressed doubts about that decision, both on moral as well as jurisprudential grounds.

Judge SCALIA. I am not sure the latter is true, Senator. I think I may have criticized the decision, but I do not recall passing moral judgment on the issue.

But I agree with your opening statement, that one of the primary qualifications for a judge is to set aside personal views.

Senator MATHIAS. However it may be with your article on *Roe* v. *Wade,* the problem remains. What does a judge do about a very deeply held personal position, a personal moral conviction, which may be pertinent to a matter before the Court?

Judge SCALIA. Well, Senator, one of the moral obligations that a judge has is the obligation to live in a democratic society and to be bound by the determinations of that democratic society. If he feels that he cannot be, then he should not be sitting as a judge.

There are doubtless laws on the books apart from abortion that I might not agree with, that I might think are misguided, perhaps some that I might even think in the largest sense are immoral in the results that they produce. In no way would I let that influence my determination of how they apply. And if indeed I felt that I could not separate my repugnance for the law from my impartial judgment of what the Constitution permits the society to do, I would recuse myself from the case.

Senator MATHIAS. I had a similar conversation with Judge Noonan of the ninth circuit at the time his nomination was before this committee. He has very strong feeling on the abortion question. But he came out at about the position that you have just expressed, that it would be necessary, if not desirable, for him to recuse himself on cases that touched so closely on that issue in which he had been an advocate, a strong spokesman working in that field.

Judge SCALIA. That is not quite what I said, Senator. I did not say that I would recuse myself in the——

Senator MATHIAS. Well, that is where I wanted to press you. How would you deal with the problem?

Judge SCALIA. I do not know what Judge Noonan told you. Judge Noonan had indeed written considerably in the field and had been one of the leading advocates.

Senator MATHIAS. He was a strong activist and was affiliated with a number of activist organizations.

Judge SCALIA. I do not think I fall into that category.

Senator **Mathias**. Under what circumstances would you think a judge who had not had that kind of a background should recuse himself?

Judge **Scalia**. Only where he himself is personally convinced that he cannot decide the question impartially because he feels so strongly about the morality of the issue. And it is not at all unusual for Justices to have to confront such cases. *United States* v. *Reynolds,* for example, which held that it was constitutional for a State to prohibit bigamy. Now, that was certainly a moral issue. The issue of monogamy for the Justices sitting on that case. They obviously—at least many of them must have had religious views about the matter and they did not feel it necessary, those who had those views, to disqualify themselves. And I do not think that any judge has to unless he or she is personally convinced that the issue has so beclouded his or her judgment that the Constitution would not be applied impartially.

I do not intend to disqualify myself except where that is the case, as far as the type of question you ask about is concerned.

Senator **Mathias**. When you were with us in 1982, you said:

> I would disqualify myself in any case in which I believe my connection with one of the litigants, or any other circumstances, would cause my judgment to be distorted in favor of one of the parties. I would further disqualify myself if the situation arose in which even though my judgment would not be distorted, a reasonable person would believe that my judgment would be distorted. That does not mean anyone in the world but a reasonable person.

Judge **Scalia**. That is right.

Senator **Mathias**. Is that the position that you will carry with you from the court of appeals to the Supreme Court?

Judge **Scalia**. Yes, it is, Senator. And what I am further saying is that I do not think that reasonable people think that the moral views that judges may hold on one piece of legislation or one decision or another so automatically beclouds their judgment that they must disqualify themselves.

I do not think that the records of the Supreme Court could possibly be read to establish that as the basis of disqualification on bigamy, on capital punishment, on an enormous number of things that men and women on the Court have had strong moral views doubtless and have sat nonetheless.

Senator **Mathias**. Now, you very carefully, and I think properly, limited this problem by saying that does not mean anybody in the world but a reasonable person.

But if a reasonable litigant actually believed that your judgment would be distorted because of some strong personal bias or belief, would that dissuade you from sitting on a case?

Judge **Scalia**. I think the statute reads that way, Senator. I have the statute somewhere. I am quite sure that the way you put it is about the way the statute reads, requiring disqualification. If I may, title 28, United States Code, section 455: "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Senator **Mathias**. Turning to the matter of precedents, as a member of the court of appeals you are bound by the precedents established by the Supreme Court. But you will very soon be in a position to change the precedents, to overturn them. So your view of the value of precedents is important.

During Justice Rehnquist's first confirmation, he said that a precedent might be less authoritative if it had stood for a shorter period of time or if it was a decision by a sharply divided court. He reiterated that view last week.

Would you agree with that general sentiment?

Judge **Scalia**. Well, I think the length of time is a considerably important factor. The *Marbury* v. *Madison* example that I gave in response to Senator Kennedy.

I am not sure that I agree with Justice Rehnquist that the closeness of the prior decision makes that much difference. I mean, if *Marbury* v. *Madison* had been 5 to 4, I am not sure I would reverse it today.

But I can understand how some judges might consider that that is an appropriate factor as well.

I agree—I certainly agree with the former. The latter would not have occurred to me, but maybe.

Senator **Mathias**. One area of law that has produced shifting majorities, and some very sharp dissent, is affirmative action. Some commentators have noted that after some years of ferment, the Court is reaching a consensus.

One of those observers is Justice O'Connor. She wrote in a concurring opinion in *Wyant* v. *Jackson Board of Education* that "the Court is in agreement that remedying past or present racial discrimination by a State actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. The Court has forged a degree of unanimity. It is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently narrowly tailored or substantially related to the correction of prior discrimination."

Do you think it is a fair observation that the Court's affirmative action decisions represent a fair measure of consensus or a degree of unanimity so that an affirmative action program that benefits persons other than the identified victims of discrimination is permissible under the Constitution?

Judge **Scalia**. Senator, I really do not think I should give my view. You are talking about an area in which it is a sure thing that there are going to be a lot more—the one thing you can say for sure about the Supreme Court decisions is that they have not answered all the questions.

There is doubtless going to be a lot more litigation in that field. And I do not think here that I should commit myself to a point of view.

If that is Justice O'Connor's opinion, and the position of a majority of the Court, that does not prove that it will not be argued to the contrary. And I have spoken my piece about stare decisis, but stare decisis is quite different from committing myself to a view before the committee that is responsible for confirming me to the Court.

Senator **Mathias**. Does the kind of consensus that Justice O'Connor mentions have any precedental value in your view?

Judge **Scalia**. Oh, I do not think it all has to be in a single majority opinion. I mean, if you have three separate opinions that add up to five justices for a particular principle of law, that principle of law has been found in that case.

Senator **Mathias**. The chairman raised the subject of the death penalty. I suspect that you have had a minimum number of the petitions on your current court from the prisoners on death row.

Judge **Scalia**. Very few, Senator, because we do not have a Federal prison within our jurisdiction. It is over in the Fourth Circuit.

Senator **Mathias**. In the other circuits, these petitions are very frequent, and the Supreme Court is constantly confronted with these petitions. And it has been a controversial, area of Court activity. It has been criticized on procedural grounds.

On the one hand, the death row petitioner usually arrives at the Supreme Court, as the chairman has suggested, at the end of a very long and tortuous road of appeals and collateral attacks and every kind of procedural gambit that can be imagined. There is pressure of every sort to decide the petition very quickly and to bring finality to the case even if it requires summary action.

On the other hand, because the penalty is irrevocable, the argument is made that each one of the petitions should be very carefully examined and weighed, and the execution date stayed until there has been full consideration.

Have you had an opportunity to consider how these competing pressures ought to be balanced? How much process is due to the death row inmate whose petition arrives at the Supreme Court just on the very eve of the day of execution?

Judge **Scalia**. Senator, to tell you the truth, that really is a subject that I have not given thought to. And it is scary, is it not? I do not know. I think that must be a very hard call.

I cannot imagine a more important issue. And you have painted the considerations on the other side. All I can say is, I will do my best.

Senator **Mathias**. It must be one of the most difficult issues to face any public official, whether it is a governor who has a death warrant presented for his signature, or whether it is a judge signing a final order. But it is one area of responsibility that I will not be envying.

Judge **Scalia**. No; I do not look forward to that as the most enjoyable part of the job, Senator.

Senator **Mathias**. In recent years, the Court has very rarely spoken with a single voice in major cases. There have been a proliferation of individual opinions, concurring opinions, dissenting opinions, separate opinions by Justices. Many of the cases that address very crucial issues are decided by a patchwork of opinions.

The result has some unfortunate aspects. The value of the decisions of the Supreme Court as precedent is diminished. And litigants can be confused about what the law really is, or they may be encouraged to make a second try to get a clearer or more favorable result.

Second, there is a concern about the effect of these increasingly sharp public disagreements on the collegiality of the Court.

As a circuit judge, have you found that the proliferation of independent opinions on the part of the Supreme Court has impeded the ability of either lawyers or judges to glean the reasoning to support a particular decision?

Judge **Scalia**. Oh, unquestionably, Senator. I do not think there is any doubt about that, including in some very important and difficult areas.

I guess the case that comes immediately to mind is the *Bakke* case on affirmative action, where what is said to be the holding of the Court is really the holding of the opinion of only one of the Justices, Justice Powell, because there were three opinions, one for four of the Justices, Justice Powell, and one for the other four. And the four that Justice Powell joined became the majority. So his opinion is quoted as the opinion of the Court.

It makes for a very confusing situation. I do not know what the solution is, except for self-restraint, I suppose. I have not been notable for writing separately on the Court that I sit on; notable for the quantity, I hope to mean.

As you know, other systems get along without it entirely. The European system typically has an unsigned opinion for the entire court, and you either win over the majority to your view, or your view does not appear.

One can run a system that way. But that is not in keeping with the rugged individualism of the common law judge, which is a quality that I think we want to retain. So I do think you need to leave room for dissents and concurrences. All I say is, it takes some self-restraint, and I hope to bring it to bear.

Senator **Mathias**. Well, I do not know that Members of the Senate are in any position to criticize verbosity on the part of others.

I see my time has expired.

The **Chairman**. The distinguished ranking member.

Senator **Biden**. Thank you, Mr. Chairman.

I apologize, Judge. I was on the floor with the introduction of another bill regarding the drug problem, and I am sorry not to have heard your original statement.

I want to pursue several areas. I will not be able to get them done in one round; but it will not be too many.

Let us start, if you will I have read all the speeches that I could find that you have written, and I find a very interesting—and I mean that sincerely—analysis of the newfound, newly enunciated doctrine of original intent. From the speeches that I have read, I cannot tell, and I am not being smart when I say this, whether your analysis of original meaning was one you meant, or whether it was done with tongue in cheek. I am unsure because you start off the speech in which you enunciate your doctrine by saying:

> When I was in law teaching, I was fond of doing what is called teaching against the class. That is, taking positions that the students were almost certain to disagree with in order to generate some discussion, if not productive thought.
>
> I have tended to take a similar contrary approach in public talks. It is neither any fun nor any use preaching to the choir.

Judge **Scalia**. I am trying to fight against that here, Senator.

Senator **Biden**. I beg your pardon?

Judge **Scalia**. I am trying to fight against that inclination here.

Senator **Biden**. Well, let yourself go. Because it is pretty boring so far. [Laughter.]

And it may be more interesting. And we may get a chance to see who you are a little bit more.

I am not suggesting that you are attempting to hide behind the argument that many use, which is, that may come before the Court; therefore I can never discuss it.

Everything may come before the Court. There is nothing in American public life that may not come before the Court; nothing. Therefore, if you applied that across the board, you would not be able to speak to anything.

But let us speak to what your speech is, and not to your cases. I want to go to your cases on freedom of speech issues next, but let us start off with this if we could.

There has been a lot of debate recently involving several members of the Court as well as Attorney General Meese about the so-called original intent doctrine. In fact in a recent speech at the Attorney General's Conference on Economic Freedoms, you offered some views on the subject and suggested that the doctrine would be better understood as that of, quote, original meaning, end of quote, rather than original intent.

Would you tell us what you mean by original meaning, as a means by which a judge should interpret the Constitution?

Judge **Scalia**. Yes; I will be happy too. But you ought to begin by noting that in that speech, I did not advocate the original intent doctrine. I just said that it should be known as the original meaning doctrine.

Senator **Biden**. Well, that is what I am trying to figure out.

Judge **Scalia**. Yes, well I will be happy to explain——

Senator **Biden**. Let me back up. Why do you not tell us how you view the interpretation of the Constitution? Do you view it as a living Constitution, to use that, quote, term of art? Do you view it as having to look to the original meaning, the original intent?

Who are you, Judge Scalia?

Judge **Scalia**. That is a good question, Senator.

I am embarrassed to say this. I am 50 years old, grown up, and everything. I cannot say that I have a fully framed omnibus view of the Constitution.

Now, there are those who do who have written pieces on constitutional interpretation, and here is the matrix, and here is how you do it.

I think it is fair to say you would not regard me as someone who would be likely to use the phrase, living Constitution.

On the other hand, I am not sure you can say, he is pure and simply an original meaning—I will be happy to explain the difference between original meaning and original intent. It is not worth it. It is not a big difference.

Senator **Biden**. What do you think?

Judge **Scalia**. What I think is that the Constitution is obviously not meant to be evolvable so easily that in effect a court of nine judges can treat it as though it is a bring-along-with-me statute and fill it up with whatever content the current times seem to require.

To a large degree, it is intended to be an insulation against the current times, against the passions of the moment that may cause individual liberties to be disregarded, and it has served that function valuably very often. So I would never use the phrase, living Constitution.

Now, there is within that phrase, however, the notion that a certain amount of development of constitutional doctrine occurs, and I think there is room for that. I frankly—the strict original intentist, I think, would say that even such a clause as the cruel and unusual punishment clause would have to mean precisely the same thing today that it meant in 1789.

Senator BIDEN. That it would have to mean that?

Judge SCALIA. Yes, so that if lashing was fine then, lashing would be fine now. I am not sure I agree with that. I think that there are some provisions of the Constitution that may have a certain amount of evolutionary content within them.

I have never been—what should I say—as I said earlier, I have not developed a full constitutional matrix. You are right, though, in suspecting me to be more inclined to the original meaning than I am to a phrase like "living Constitution."

Senator BIDEN. I am not being smart when I say, Judge, I do not suspect you of anything? I mean, truly.

Judge SCALIA. I did not mean it that way.

Senator BIDEN. As I read your speech—you talked about quote the speech. We have the speech.

For the record, what the judge meant was, he said that he essentially has one speech a year that he gives when he is invited to the law schools and other places as a sitting judge. He does others, but that is one. And he referred to the speech. And the speech had been one relating to the value of congressional input beyond the face of the statutes that we pass, and also this notion of original meaning, original intent.

I could read this both ways. I mean, I can read your speeches as saying you are being a devil's advocate and being a provocateur, on the one hand. I just hope you do not mean it. I am serious when I say that.

For example, if you mean—if you subscribe to the view that you articulate as to what original meaning means, then I have real problems voting for a judge who holds that view. But the way you just explained it, it seems as though you are not totally wedded to that view; that you lean that way, but for example, in the area of cruel and unusual punishment you see room for evolution, I assume you would argue the same regarding the 14th amendment. I assume you would say you could have gotten from *Plessy* to *Brown,* I hope.

Judge SCALIA. I have always had trouble with lashing, Senator. I have always had trouble thinking that that is constitutional. And if I have trouble with that——

Senator BIDEN. Are you being serious or being a wise guy?

Judge SCALIA. I am being serious, no; I am being serious.

Senator BIDEN. I just wanted to make sure.

Now, I have trouble with a number of these interpretations. For example, there has been much written lately on original intent; which is not what you have been saying, I acknowledge.

I have real trouble with that notion—that doctrine. But let's skip that for now. I will come back to that in a little bit, because my time is running out and I want to speak to another area.

One issue you talk about, where you have written, and where you have, quote, judged, has been the issue relating to independent regulatory agencies.

And again, I want to make sure I understand the parameters of your interpretation of the role, if any, of independent regulatory agencies. So let us not be case specific; let us be philosophical for a moment.

As I read your writings and your cases, you basically say the following:

> That the Founding Fathers came up with three coequal branches of Government; that somewhere in the late eighteen hundreds, along came the Congress and set up an independent regulatory agency; that Congress gave to the head of that agency executive powers; and that Congress has repeated that in subsequent years, from 1890 through today; and if, in fact, the head of an independent regulatory agency is not serving at the pleasure of the President, that is, able to be fired by the President, relieved without cause by the President, then, what the Congress has attempted to do is unconstitutional, i.e., they have essentially established a quasi-executive branch of the government, which is a fourth branch of government sitting out here.

As I read your writing, you say that is unconstitutional. Now is that an accurate reading of your position relating to independent agencies?

Judge SCALIA. Senator, I think you were out of the room when I was asked about independent agencies before. I would love to talk about independent agencies. It has been an area—an abiding interest of mine. And my writings will have to speak for themselves.

But I have a real special problem when it comes to discussing this topic. Which is, not just that the case will come before the Supreme Court if I am confirmed, but that I have a case before my present court, mounting precisely the kind of constitutional case you have just described. It is currently before the court on which I sit. And I really think I should not be discussing the——

Senator BIDEN. Before the chairman rules, I will not follow up—even though his ruling would be wrong—I will not follow up on it.

The CHAIRMAN. I will not rule, then, if you are not going to ask any more questions. [Laughter.]

Judge SCALIA. Could I say this, though, Senator, which speaks not to the constitutionality of it at all, but to the fact that it may be—there may be less to it than meets the eye. Because I have found that there is not much difference, if indeed there is any difference, in modern times between the independent agencies, in the proper sense, and other executive agencies. Indeed, many people do not know which is which. The Food and Drug Administration, for example. Most people think it is an independent agency. It is not an independent agency. It is an executive branch agency. Yet it seems to be as independent of Presidential improper influence as one of the independents.

Senator BIDEN. Well, maybe we can talk about it that way. If you take a look at the Fed, the rationale for the Fed being an independent agency is equally as strong today as it was when it was set in place.

I cannot imagine the chaos that would be caused in international monetary markets if, tomorrow, the President of the United States had the power to relieve at will—you need not respond to this—but relieve at will the head of the Fed. Because everybody knows that every President, Democrat or Republican, in times of economic difficulty, tries very hard to speed up the money supply about 8 months before an election. I mean, that is a fact of political life. Were I the President, perish the thought, I might think of that myself. Were Senator Hatch President, I am sure he might think of that.

Everybody knows that. Everybody knows that that is precisely what Presidents have attempted to do; and would do.

If in fact the Chairman of the Board of the Federal Reserve System were to operate at the will of the Executive, I truly believe we would have economic chaos, worldwide, not nationwide. Because the fact of the matter is that, as the Hoover Commission noted in 1949, these are all a means of insulating regulation from partisan influence and favoritism.

And there is great concern about that. But I will try another tack. I have to think of an imaginative way to get you to talk about this critical issue without being overruled by the chairman. So let me move to another subject.

Freedom of speech: Something near and dear to the chairman's heart.

I am only kidding, Mr. Chairman.

Let me ask you: The first amendment to the Constitution states: Congress shall make no laws abridging the freedom of speech.

How do you define speech, Judge?

Judge SCALIA. I define speech as any communicative activity.

Senator BIDEN. Can it be nonverbal?

Judge SCALIA. Yes.

Senator BIDEN. Can it be nonverbal and also not written?

Judge SCALIA. Yes.

Senator BIDEN. So freedom of speech can encompass physical actions?

Judge SCALIA. Yes, sir.

Senator BIDEN. Good. That is a relief, because as I read your case, what I viewed as your dissent in the *Watt* case, I wondered whether or not you could——

Judge SCALIA. Yes. Well—do you want to talk about it?

Senator BIDEN. I would like you to amplify, if you would.

Judge SCALIA. Let us talk about that. *Watt* was a case in which what was at issue was sleeping as communicative activity.

Senator BIDEN. Yes.

Judge SCALIA. I did not say in the separate opinion that I wrote in that case, and that opinion was a dissent——

Senator BIDEN. Correct.

Judge SCALIA [continuing]. Of our court. That dissent was vindicated by the Supreme Court, as far as the outcome was concerned.

Senator BIDEN. But a different rationale.

Judge SCALIA. Not the rationale.

What I said was that for purposes of the heightened protections that are accorded, sleeping could not be speech. That is to say, I did not say that one could prohibit sleeping merely for the purpose of eliminating the communicative aspect of sleeping, if there is any.

It was alleged that there was in this case, because people wanted to sleep in the national park across from the White House in order to demonstrate that there were homeless. And it was alleged that the sleeping was a communicative activity.

I did not say that the Government could seek to prohibit that communication without running afoul of the heightened standards of the first amendment. If they passed a law that allows all other sleeping but only prohibits sleeping where it is intended to communicate, then it would be invalidated.

But what I did say was, where you have a general law that just applies to an activity which in itself is normally not communicative, such as sleeping, spitting, whatever you like; clenching your fist, for example; such a law would not be subject to the heightened standards of the first amendment.

That is to say, if there is ordinary justification for it, it is fine. It does not have to meet the high need, the no other available alternative requirements of the first amendment.

Whereas, when you are dealing with communicative activity, naturally communicative activity—writing, speech, and so forth—any law, even if it is general, across the board, has to meet those higher standards.

Senator BIDEN. But if you walk in and you sit down in a place that you are not allowed to protest an action that is being taken in that place, does that require the heightened justification? Or does that fall within the same category as the spoken word?

Judge SCALIA. No; I would think that that law—no; I cannot imagine that you are entitled to—that would allow you to disobey any law that does not have a very serious governmental purpose, just for the purpose of showing your contempt of that law.

For example, the best way to communicate your contempt for a law against spitting in the street is to spit in the street. How better to show your contempt for that law, except by disobeying it?

Senator BIDEN. Let me be more specific. Let us say you take a physical action like sitting down to protest a law that has nothing to do with preventing people from sitting. It has to do with whether or not black folk can be served in restaurants. And they say, no; you cannot. So you sit out there on the sidewalk.

Now, clearly, the physical action being taken is not being taken to demonstrate that the law against sitting down——

Judge SCALIA. That is right.

Senator BIDEN [continuing]. Is in fact wrong. It is being taken to demonstrate another law, unrelated to the physical action, is incorrect.

Does that situation require a heightened standard?

Judge SCALIA. I think not, Senator.

In fact, it seems to me it happens all the time when people protest in front of some embassies. Those laws are not subjected to heightened scrutiny, I do not believe. They are just laws that you cannot be at a certain location.

If you want to protest, as a means of civil disobedience, and take the penalty, that is fine. But if the law is not itself directed against demonstrations or against communication, I do not think it is the kind of law that in and of itself requires the heightened scrutiny.

That was the only point I was making in——

Senator BIDEN. That is very helpful to me. I am not being smart when I say that. That puts my mind at ease a great deal.

Judge SCALIA. And listen, I may be talked out of that. I am just explaining to you what I was saying in CCNY.

Senator **Biden**. No; do not let them talk you out of it.

Judge **Scalia**. And I am not saying that I would hold that way in the future.

Senator **Biden**. Let me be specific, what I was referring to.

You quote in your dissent: In other words, the only first amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter, so far as the first amendment guarantees are concerned. If so, the court then proceeds to determine whether there is substantial justification for the proscription just as it does in free speech cases.

Your explanation has been helpful to me. I hope you will continue to do this with me for a couple of rounds.

Judge **Scalia**. I thought it worked. I mean, the explanation.

Senator **Biden**. No, no; it does. But you understand how, without that explanation, that it is possible someone could read a more restrictive application; at least it was my concern.

Judge **Scalia**. I will have to write longer opinions.

Senator **Biden**. It was one of those areas of ambiguity, that I would like to talk to you about, how you deal with that with legislative ambiguity.

Judge **Scalia**. OK; thank you.

The **Chairman**. When the judge rules with you is a good time to stop.

Judge **Scalia**. I think that is a good idea, Mr. Chairman.

The **Chairman**. The distinguished Senator from Utah.

Senator **Hatch**. Thank you, Mr. Chairman.

Judge, you are doing fine. There was some suggestion that the *Synar* case was attacking certain precedents of the Supreme Court, for instance, Humphreys Executor. And that particular case among others was not an instance of judicial activism, but a decision based on the interpretation of clear constitutional language. Basically, the language in the Constitution said that the executive power shall be vested in the President.

Moreover, the opinion demonstrates your commitment to law over policy preferences. It is not inconsequential that even though Gramm-Rudman's objective, that is, cutting deficits, is one of the preferences that you have been for in the past, nevertheless, you joined the per curiam opinion finding that particular section of Gramm-Rudman unconstitutional.

What it shows to me is, one, you interpret the language of the Constitution directly, and two, you can decide against your own policy objectives.

It suggests to me that you are more wedded to the law and good judgment than to dictating the outcome of particular cases in accordance with your own personal views. And I thought that was an interesting case.

As a judge, how do you insure that your own policy preferences do not conflict with your own legal judgments?

Judge **Scalia**. Well, Senator, I suppose that that is the hardest thing to do. Although it takes, I guess, a certain cast of mind which is probably called judicial or judicious.

I think my record shows that I have done that. I do not think the *Gramm-Rudman* case is the only one.

Senator HATCH. No, I do not either.

Judge SCALIA. It was mentioned earlier that a lot of my opinions are in the regulatory field; that is a field in which I used to labor. Administrative law was one of the subjects that I taught, and as I mentioned earlier, I was editor of Regulation magazine. And one of my policy preferences in those days was deregulation. But an examination of my opinions will show that I have fully enforced actions by agencies that go in precisely the opposite direction; and indeed, I have stopped agencies from going in a deregulatory direction when it seemed to me, however unwise it might have been as a policy matter, the statute simply did not let them do it.

So it is doable, is all I am saying, Senator. And I think I can do it.

Senator HATCH. That is great.

I personally believe that the Supreme Court will benefit a great deal from your expertise in administrative law. I expect you to become the person who can really untangle some of the thickets that have existed on the Supreme Court through the whole lifetime of the Court in that particular area.

Let us move to free speech. We have had some comments about your decisions in free speech. Let me go to the *Ollman* case, for instance.

In that case, the plaintiff was a Marxist professor. He claimed that articles in a newspaper actually defaming his views cost him his position as a department chairman at the University of Maryland.

This became, in the eyes of people around Washington and around the country, a liberal cause celebre.

You sided with the professor, as did four of the five leading liberals on the court—if the judges can be so categorized. And sometimes you have to question that on the D.C. Court of Appeals.

Judge SCALIA. I think that is right, Senator.

Senator HATCH. Still, you are accused of being weak on free speech because you voted against the newspapers. I just want to point out that it seems to me that there are important free speech arguments on Professor Ollman's side as well. In other words, there were two sides to that case. And you mentioned that there is another side to the *Ollman* case.

From his vantage point, he has rights to speak and hold constitutional opinions or other opinions that are controversial. He brought a defamation suit in order to vindicate those rights against the newspapers.

Lies and libel should not properly be a part of robust and uninhibited exchanges of ideas. For this reason, the first amendment has always tendered less protection to libel speech than to other forms of expression.

I can imagine that if you had voted against Ollman, you could have been maligned for voting against a Marxist professor because of his unpopular views. There were two sides to this free speech issue.

Either way, somebody could have accused you of being weak, on first amendment rights and privileges, and especially, in this case, free speech.

That particular case demonstrates that there are generally two sides to almost every case.

Now what steps do you take as a judge to insure that you are going to give a fair hearing to both sides of any issue that comes before you?

Judge SCALIA. Well, the start of it is, Senator, that I—maybe it is a quirky cast of mind, I do not know, but I like playing with statutes and finding out what they mean. And that is where I start from; not, where would I like to come out in this particular case. And I think that is what any good judge—how any good judge approaches the matter.

And from there, you obviously have to read, with attention, the briefs of both sides; listen to the arguments of both sides; and not make up your mind firmly. You cannot help getting intimations of which way you are leaning as you go along. But do not make up your mind firmly until you are all done with everything, including the oral argument and including listening to the comments of your colleagues in the conference after oral argument.

It is a difficult process. But I do not think it takes a superhuman effort to come out a way that you do not think is sound as a policy matter. You learn very soon that the policy calls are not yours to make. And there are a lot of cases where you have to come out with decisions where you think that the direction it may be moving the society or the agency is the wrong one; but that is not your job to figure out. The Constitution gives those calls to other people who, by definition, know better, because they are democratically elected.

Senator HATCH. The point is that there are two sides to these cases. You have deliberated and listened to both sides. You have had much criticism from the first amendment, free speech, standpoint from certain journalists and others.

Judge SCALIA. I have not understood that, Senator. I have really not understood——

Senator HATCH. I have not either.

Judge SCALIA [continuing]. The basis for that at all. Because I do not think my record on the first amendment is at all illiberal, if you want to use that word.

Senator HATCH. There is room to disagree. But on the other hand, there is room to disagree both ways. That is the point I am making. It hardly makes you someone who is making an onslaught on first amendment rights and privileges.

I would point out a couple of other cases that I think are important to show your legal reasoning and what you have done on the bench.

In Liberty Lobby—that was the *Jack Anderson* case—you held that many allegedly libelous statements were actually entitled to first amendment privileges and protections.

For instance, you would have extended protection to Jack Anderson's assertion that the plaintiffs were Nazis, on the basis that this is an opinion, and therefore, it is protected, as I understand it.

In other aspects of the case, however, you said that the statements were actionable as libel. I would hasten to point out that in that particular case, you were joined in your opinion by a person who some would call a "liberal"—Judge Edwards. And on appeal, you were joined in the opinion by a mixed group of Justices, Mr. Justice Brennan, Mr. Justice Burger, Chief Justice Burger, and of course, Mr. Justice Rehnquist.

Judge SCALIA. In dissent, alas.

Senator HATCH. That is right. They were in dissent. They would have affirmed though your result. This shows that there can be room for disagreement.

In the *Tavoulareas* case, which was the Washington Post case, you joined an opinion saying that aggressive, investigative reporting could be evidence of actual malice, which is an element, of course, of a libel action.

Now this was actually borrowed from the 1967 *Butz* case, written by Chief Justice Earl Warren, who few would consider to be an enemy of free speech.

The reason I am bringing these out is because in the criticisms that have arisen, you deserve to be given fairer treatment than you have been given, even though there is room for disagreement in these very controversial and difficult areas.

You did a terrific job of explaining what symbolic speech is in your explanation of the *Community for Creative Non-Violence* v. *Watt*, where you held that demonstrators were permitted to demonstrate around the clock in two D.C. parks, but you denied permission for people to sleep in temporary shantytowns right across from the White House.

I hasten to point out, that you did not challenge the established doctrine that some forms of conduct are symbolic speech, and therefore entitled to first amendment protection.

You find, however, that sleep is not expressive conduct, and you expressed that very well here today. Even though there are those who are on the other side from you in these cases, you are not, in my opinion, insensitive to first amendment rights and privileges. There are, as in all of these cases, two sides. I want to compliment you for being able to listen to both sides.

Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman.

Judge Scalia, my colleague, Senator Biden, touched on the 14th amendment. Realizing that cases are pending before you now, or in the future, I would like to pursue it a little bit.

Justice Rehnquist was questioned quite extensively on his interpretation of the 14th amendment's equal protection clause.

His interpretation of this clause is that the framers intended that it only apply to racial discrimination, and maybe its cousin, national origin discrimination.

Justice Rehnquist would disagree with those who have argued before the Supreme Court that there are suspect qualifications such as sex, alienage, and illegitimacy; that there are fundamental interests protected by the equal protection clause such as the right to vote, right to travel, interest in marriage and family.

Do you agree with this restrictive interpretation of the equal protection clause? What is your interpretation of that clause?

Judge Scalia. Well, I am not sure the description of—I did not hear all——

Senator DeConcini. How do you interpret the equal protection clause?

Judge Scalia. Well, I would be surprised if I heard Justice Rehnquist say it only applied to racial——

Senator DeConcini. Well, he did not say it only applied, but he said a separate standard in the 14th amendment, as I recall his testimony, as it applied to sex or alienage or illegitimacy——

Judge Scalia. That is right.

Senator DeConcini [continuing]. Different than as it applied to race——

Judge Scalia. So-called suspect categories.

Senator DeConcini [continuing]. And maybe origin, national origin?

Judge Scalia. Right. That is the current Supreme Court law on the subject and I do not think I should be in the position of saying whether I agree or disagree with the Supreme Court law on the subject, which is not to suggest at all, that I have any doubt about it any more than I necessarily have any doubt about *Marbury* v. *Madison*.

Senator DeConcini. Well, do you think there is, in the 14th amendment equal protection clause, a standard separate for sex discrimination as there is for racial discrimination? Can you just tell me your own opinion on that?

Judge Scalia. I do not think I should, Senator, because that may well be an issue argued before the Court, and I do not want to be in a position of having, in connection, as a condition of my confirmation——

Senator DeConcini. Well, I understand that.

Judge Scalia. Giving——

Senator DeConcini. I understand that.

Judge Scalia [continuing]. An indication of how I would come out on it.

Senator DeConcini. Yes, I understand, Judge Scalia, but I think it is fair for us to ask what your feelings are on whether or not there may be more than one standard. Disregard the question as I put it.

Do you think that under the equal protection clause, that there is more than one standard in that clause?

Judge Scalia. Under current law, there certainly is, yes.

Senator DeConcini. And are you comfortable with that, or just what is your philosophy or feeling about it? I am not asking you to commit yourself, how you are going to vote on a case. I would just like to know a little bit——

Judge Scalia. I know you are not asking me to commit myself.

Senator DeConcini [continuing]. How you feel about that equal protection clause. I know you are not putting it in the context

Judge Scalia. I know you are not putting it in the context, how would you vote, but when you are asking that question, in the context of whether you will vote for me to go on the Court—the reason you are asking the question, and the reason I am making my response is clearly so that you will know whether this individual will vote in a way that you think will make him a good Justice.

Senator DECONCINI. No, that is not necessarily so. I have pretty well committed myself to vote for you, based on your experience and qualifications, even if I happen to disagree with you.

I have voted for a lot of judges and I plan to vote for Justice Rehnquist and I disagree with him. I voted for Patricia Wald who sits on your court, and I disagree with her on many, many decisions. I disagreed with many of her opinions that she held when she was at the Justice Department.

I still voted for her. I asked her several questions, even questions about abortion, and she told me what her beliefs were, not how she was going to decide cases.

Judge SCALIA. But that is quite different.

Senator DECONCINI. And I went ahead and voted for her.

Judge SCALIA. But that is quite different. I will tell you, you know, my personal beliefs on abortion if——

Senator DECONCINI. Well, I do not know, I do not remember if I asked her about the 14th amendment, but my question is whether or not you think there are several standards of the 14th amendment. You obviously do not want to answer that.

Judge SCALIA. Senator, the reason I—I do not want to suggest it is a hard question.

Senator DECONCINI. Oh, I agree with you. I am not suggesting it is easy.

Judge SCALIA. But that is not just a slippery slope; it is a precipice. From then on, I am put to the task of deciding which of those questions are hard ones, and which are not hard ones. So it might still be debatable, and there is no way that I can successfully negotiate my way through such line drawing.

I just cannot do it, and, I think the only way to be sure that I am not impairing my ability to be impartial, and to be regarded as impartial in future cases before the Court, is simply to respectfully decline to give an opinion on whether any of the existing law on the Supreme Court is right, or wrong.

Senator DECONCINI. And I am not asking, Judge Scalia, is the existing law right or wrong.

Just for the record—and you are not going to answer, obviously. Just for the record, I'm not asking you do you agree, or disagree with the Supreme Court. I am even changing my question: Do you agree or disagree with Justice Rehnquist? I just simply ask: under the 14th amendment, equal protection, do you think there is more than one standard there? That is all I ask you. If you do not want to answer it, you are a free man, and you do not have to.

Let me ask you another question. In the Washington University Law Quarterly, you wrote a statement to the effect that affirmative action programs should benefit those who are truly disadvantaged and poor, and should not be for the advantage of the children of the prosperous or well educated.

And having said that, let me say that I tend to think there is a lot of merit to that. But let me ask you this question, in a hypothetical sense, Judge, not on any case you are going to rule on now.

Don't we have to acknowledge we have special societal problems in our inner cities. They have become increasingly populated by minorities, with a large number of people—particularly children and women, and teenagers, and young adults—who need some assistance. Isn't it necessary that all three branches of our Government take special notice of these people instead of leaving them to the lives of what they have today?

And isn't it permissible for legislators to design programs for the benefit of those populated groups who are disproportionally disadvantaged, even if these programs also benefit the individuals who are not targeted?

Now what I would like to know is, how should the courts, if at all, participate in an effort to solve this societal problem?

Judge SCALIA. I am happy to answer the last half. I think courts should be, obviously, as concerned about massive societal problems, such as the problem of discrimination in this country as either of the other two branches.

Senator DECONCINI. That is encouraging. Thank you.

Now, Judge Scalia, in another article in a Regulation magazine, 1982, entitled, "Freedom of Information Act Has No Clothes," you argued that the defects of the Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth.

You defined this obsession as the belief that the first line of defense against an arbitrary Executive is a do-it-yourself oversight by the public and its surrogates, the press. Now do you continue to believe that the Freedom of Information Act goes too far, or am I misinterpreting that article, or that paragraph I read to you?

Judge SCALIA. Yes, I have tried to avoid making any public statements on controversial issues of public and political policy since I have been a judge, and I think I should adhere to it.

What I wrote in that article is in print, and I guess you can hold it to me as being my views at that time.

Senator DECONCINI. Are they still your views, then? I guess that is the next question.

Judge SCALIA. I do not think I should say. As far as a litigant who has to appear before me is concerned, it is troublesome enough to them, I suppose, that I once wrote views on one side or another like that, to reaffirm them after I am a sitting judge who——

Senator DECONCINI. Well, is it safe to say——

Judge SCALIA [continuing]. Whether I am confirmed or not, and especially if I am not confirmed, we will be having a lot more FOIA cases in the future.

Senator DECONCINI. Well is it safe to say that since 1982, your view is unknown?

Judge SCALIA. Yes. Let's say it that way and——

Senator DECONCINI. So in 1982, it was pretty clear, and now, you do not know.

Judge SCALIA. Yes. I guess if we put it that—it is unknown. Now let's not say that I do not know.

Senator DECONCINI. It is unknown.

Judge SCALIA. But if you want me to—if you have concern on the Freedom of Information Act, I have been critical, not of the entire concept of the act, and not indeed of the original act, but just of some aspects of the 1974 amendments.

I think my record, sitting on the District of Columbia circuit, shows that I have applied the act, including those portions of it that I was not enamored of, fairly, and, indeed, if I have any landmark decisions regarding the Freedom of Information Act, I suspect they go in the direction of broadening its application, rather than narrowing.

Senator DECONCINI. Except for the recent amendments?

Judge SCALIA. Except for—excuse me?

Senator DECONCINI. Except for the recent amendments? You indicated that you had some problems with the——

Judge SCALIA. No, no. I am saying my decisions on the court, as far as interpreting the Freedom of Information Act is concerned, if any of those were really significant decisions that made significant law, I think the ones that would fall into that category were in the direction of expanding the access under the Freedom of Information Act, rather than narrowing it.

Senator DECONCINI. But you would——

Judge SCALIA. I can go into chapter and verse on that, but it is very dull stuff, Senator.

Senator DECONCINI. As far as you can comment, you would advocate less restrictions on disclosure? You know, am I interpreting that correctly, or would you advocate more?

Judge SCALIA. Currently, Senator, I would advocate neither because it is not my business anymore. You write it; I will enforce it.

Senator DECONCINI. Well, that is an easy way out of answering the question, Judge, in my opinion.

Without asking you to side in a disagreement between Justice Rehnquist and Justice Burger, I would like to know your opinion from the viewpoint of the circuit court judge, of the operation of the Federal courts, and particularly, the Supreme Court.

Would you like to see the Supreme Court in a position to be able to grant more certiorari petitions and circuit court opinions?

Judge SCALIA. Oh, I think it would be wonderful. I do not know how, physically, they could do it and keep up with the——

Senator DECONCINI. Well, let me just bring up this: Justice Rehnquist testified that he felt that the Court was not overworked. I do not know if you are aware of that, or not.

Justice Burger has been a great proponent of convincing many of us that, indeed, there needs to be many changes so the Court is not overworked.

I am just interested in your opinion, and maybe you do not have one because maybe there is going to be a case before the Court on it. I do not know.

But do you think the Supreme Court is overworked? What is your analysis of that Court?

Judge SCALIA. Not having been up there, I do not know. I could say this, though: that I think, as a lower court judge, what is much more troubling than the fact that the Supreme Court does not decide more cases, is the fact that the cases they do decide are often decided with three and four opinions. So that it is very difficult for the court of appeals judge to know what they are telling us to do.

I am not sure which direction it is better to go: to write more opinions or to write fewer opinions, but spend more time getting together on one opinion for the whole Court. If you asked—if you took a poll of court of appeals judges, I would bet you they would pick the latter.

Senator DECONCINI. Yes. Thank you, Judge. What about addressing this problem for me: Congress is presently considering legislation to create, on a trial basis, an intercircuit panel to resolve the conflicts between the various circuit courts. How do you feel about that?

Judge SCALIA. Well, let me give you the court of appeals judge's point of view again. The immediate effect of it, of course, is to render judges who are now sitting on the second highest court in the land, judges sitting in the third highest court in the land, and that is not likely to make——

Senator DECONCINI. How do you feel about it, Judge?

Judge SCALIA. As a policy matter for the country?

Senator DECONCINI. Yes. Do you think it has merits, or do you think it is not necessary, or what?

Judge SCALIA. I think it is terrible, and the only question is whether the alternative is more terrible. I do not think anybody is happy about having a four-level court structure. It is more cumbersome. It is more expensive for litigants.

Senator DECONCINI. So unless the case was made that it was necessary, you do not think——

Judge SCALIA. I think that is so, but I do not think any—I do not think that is telling you anything that is very useful.

Senator DECONCINI. But there has been some debate here as to whether or not those judges should be taken from the various circuit courts or whether they should be appointed by the Supreme Court. A suggestion was made in the markup that they be appointed by the President and confirmed by the Senate.

Do you have an opinion of what you think would be best for that intercircuit panel, if, indeed, it was established? Where the judges come from.

Judge SCALIA. Certainly, if it is to be made a permanent thing, it seems to me you should do it right, and have the appointments the way article III judges are normally appointed to courts—appointment by the President to that court, a nomination by the President to that court, advice and consent of the Senate.

Senator DECONCINI. How about on a trial basis, which is the way the legislation did pass the Judiciary Committee? Do you have an opinion? I am only looking for something to——

Judge SCALIA. Yes. I do not know. I think it is a close call, whether——

Senator DECONCINI. You are on the bench.

Judge SCALIA [continuing]. On a trial basis, a quick and dirty trial, you want to do it on some different basis, I could see doing it that way, temporarily.

Senator DECONCINI. Judge, I have been interested in formulating a constitutional provision for judicial discipline short of impeachment. The Congress did pass the Judicial Discipline and Tenure Act several years ago. That act required circuit courts to set up a procedure for discipline.

Do you know if the District of Columbia circuit court has set up such a procedure?

Judge SCALIA. Yes. I think all the courts have a circuit council, now, that implements the act.

Senator DECONCINI. Do you know the experience the courts have had with this act? Has there been many complaints, or——

Judge SCALIA. Yes. I think complaints are many—no, I would not say many, but there are complaints and the complaints are processed.

I am not sure that the fact that you do not—that the procedure is not very visible to you, or to anyone else, means that the procedure is not working.

It is working, and maybe the fact that it is working well simply stops many of these things from coming to public attention when they otherwise would.

Senator DECONCINI. Do you know if there have been complaints filed and some action taken on them?

Judge SCALIA. Oh, yes. Yes; I do.

Senator DECONCINI. Do you know if there has been any discipline? I am not going to ask you who or what. But do you know if there have ever been any discipline discussions relating to your circuit or any other circuit?

Judge SCALIA. I do not know, Senator. Oh, I am sure, if you say my circuit, or any other circuit, I am sure there have been.

Senator DECONCINI. Well, I am not aware of any. I just wondered if, through the grapevine of the Judicary Conference, if you knew of any. I am not going to ask you to be specific. Do you know of any disciplinary actions that have been taken as a result of that judicial——

Judge SCALIA. Well, I think there was one in our circuit, as a matter of fact.

Senator DECONCINI. Thank you.

Judge SCALIA. At least one.

Senator DECONCINI. Many critics of the so-called bureaucracy have been strangely silent, it seems to me, for the last few years. It is almost as if the criticism might have been motivated out of politics. That never happens in this town. We know that.

I am interested to read in Regulation Magazine, AEI's magazine. Your advice to the President concerning the bureaucracy. And you wrote:

> Replacing their bureaucracy with our bureaucracy does not solve the underlying difficulty. The point is that no bureaucracy should be making basic social judgments. It is perverse to delight in our ability to change the law without changing the law.

What do you think can be done legislatively and what can be done judicially to rein in the bureaucracy?

Judge SCALIA. Well, let me begin by saying I have never been a bad mouther of the bureaucracy. Most of the people I have known in the government, and I have worked in the executive branch in three different positions, most of them are good, hard-working, talented, dedicated people, and trying not to pervert the law but, to the contrary, implement it.

The problem I was addressing there was simply the fact it is the same point I was discussing with Senator Kennedy earlier as a matter of fact. It is a problem of excessive delegation. Too many of the basic judgments are simply not made in the statute. They are left to be made by the agency that implements it.

To the extent that can be avoided, that is the way to go. Otherwise, when you change an administration, without any vote to change the law, suddenly the same law is being administered in a different direction, and that swing can be more or less extreme depending upon how specific the statute itself.

Senator DECONCINI. Does the judiciary play any role in that?

Judge SCALIA. The judiciary stops the swing from going beyond the bounds of the reasonable. But when it is drawn with sufficient vagueness, even the reasonable swing is a pretty broad one.

I am sure Congress is aware of the problem. It is a hard one to get a hold onto.

Senator DECONCINI. Thank you. Thank you, Judge.

Thank you, Mr. Chairman.

The CHAIRMAN. After Senator Grassley, we will take a 10-minute recess.

The distinguished Senator from Iowa.

Senator GRASSLEY. Thank you, Mr. Chairman.

It is my understanding that much of the work of the District of Columbia circuit involves the regulatory agency cases and administrative law, and you have obviously thought and written a great deal about those issues. And I think it is fair to suggest that, if confirmed, you are going to play a special role in future Supreme Court cases in those areas.

I am interested in the area of administrative law from my chairmanship of a subcommittee here of this committee. Now I understand you to be an outspoken opponent of the legislative veto. You have criticized Congress for—and these are your words—"passing laws with strings attached."

And I personally disagree with your view because I am opposed to the tremendous amount of legislating done by faceless bureaucrats who are not elected by anyone.

So I would like to explore the subject of the legislative veto.

What if Congress enacts legislative veto legislation that satisfies, one, bicameral passage, and, two, the presentment requirements set out in the Constitution, is that not about all that is constitutionally required?

Judge SCALIA. Those are the only two problems that were raised against the type of veto that was struck down in *Chadha*. And I suppose if those two requirements, if those two problems were overcome, the problem would be eliminated. But I am not sure you would still call it a legislative veto.

Senator GRASSLEY. Well, in writings that you have done in the Administrative Law Review articles, 1976; Regulation magazine in February 1981; Regulation magazine in December 1979, you cite only those two constitutional imperfections.

So your view today then is similar to what you had previously written?

Judge SCALIA. Well, what matters today is not my view of what I previously wrote, but what the Supreme Court subsequently decided, that is subsequent to what I previously wrote, the *Chadha* case.

Senator GRASSLEY. Well, assume again——

Judge **Scalia**. I think you are presenting to me a situation in which the two defects discussed or identified in *Chadha* were eliminated on the basis of *Chadha*——

Senator **Grassley**. Assume again that a legislative veto statute then would meet the *Chadha* test.

Do you not agree that a legislative veto serves a virtue in today's age where it is so difficult for Congress to legislate policy, statute by statute, against a backdrop that we find ourselves in here of constantly changing issues?

Judge **Scalia**. Senator, as I told Senator Kennedy, one of the things I have always been concerned about, and my writings show it, is the problem of excessive delegation by Congress to the agencies. It is an awfully hard problem to deal with. To the extent that there is a device that will enable Congress to review more closely the activities of the agency, that is desirable. There is some way to get proper legislative attention to what the agencies have done by way of implementing earlier statutes.

Senator **Grassley**. Well, you accept the environment and decide within that environment, I hope, that Congress reacts; that we cannot anticipate crises, and that I hope you accept that it is unreasonable to expect Congress to do otherwise, and then accept the fact that that is why Congress delegates authority to agency expertise.

Judge **Scalia**. Right. I understand. I think that is right.

Senator **Grassley**. I think we all agree with the Constitution lasting 200 years now, and hopefully for another 200 years, that we have found our Founding Fathers to be very practical people.

I have a hunch that given the range of agencies that we now have today, whether it be FERC or the FCC or the Consumer Products Safety Commission, and you can go on and on, which, of course, they, writing 200 years ago, could have never dreamed of, that they might find the veto a fair and practical way to deal with bureaucracy today.

Do you disagree with that?

Judge **Scalia**. It is conceivable that had they envisioned the kind of a system that would develop, they would have made provision in the Constitution for a legislative veto. Although, as the Supreme Court has said, they did not. That is what the Supreme Court has said to date.

Senator **Grassley**. Well, what the Supreme Court said to date is what Congress passed for a legislative veto up until *Chadha*, that those forms of legislative veto are unconstitutional.

You are said to be a free market advocate who favors economic deregulation. I made reference to the fact that you had written for Regulation magazine, and you said you had edited it; that is kind of a gospel of deregulation.

I am not going to ask you to comment on any specific regulation, but can you give me some indication of what factors you consider when faced with a constitutional challenge to economic regulations?

Judge **Scalia**. I do not recall that I have been confronted with a constitutional challenge to economic regulations during the entire time I sat on the Court I am now sitting on. In fact, the constitutional challenges to economic regulation are pretty rare nowadays.

Most of the challenges are on the basis of whether the statute permitted the economic regulation in question.

I really would not even know where to begin to grapple with the question you ask. I am sure the experience of my circuit is not different from the experience of most circuits. It is very rare that economic regulation nowadays is challenged on constitutional grounds.

Senator GRASSLEY. Well, along that——

Judge SCALIA. You know, equal protection challenges have just not fared very well in the last half century anyway. And that would be the normal source of attack.

Senator GRASSLEY. Well, must a regulation be more than simply wrong headed for it to be overturned?

Judge SCALIA. Oh, absolutely. Yes.

It would have to be more, and the agency's action would have to be more than wrong headed to be overturned on statutory grounds as well. It can be reasonably wrong headed, and we will approve it.

Senator GRASSLEY. In a case decided last year, *Hirschey* v. *FERC*, involving the Equal Access to Justice Act, you took the occasion to comment on what role legislative history and committee reports play in judicial interpretation. And I hope it is fair for me to conclude that you showed a great deal of hostility toward committee reports in that writing.

You wrote in a concurring opinion, and I quote, "I think it's time for courts to become concerned about the fact that routine deference to the detail of committee reports and the predictable expansion in detail with routine deference has produced have converted a system of judicial construction into a system of committee staff prescription."

Now, that is pretty doggone strong language.

Let me first ask how important is legislative history to you?

Judge SCALIA. I think it is a significant factor in interpreting a statute. I have used it in my opinions.

Senator GRASSLEY. Well, let me ask you how come you do not repeat the usual answer that we get that, you do refer to it, if the language of the statute itself is not clear to the judges interpreting?

Judge SCALIA. Well, I guess I did not repeat that because I——

Senator GRASSLEY. It is so obvious?

Judge SCALIA. It is so obvious and——

Senator GRASSLEY. But you accept——

Judge SCALIA. One, it is so obvious and, two, because we do not normally have a lawsuit in front of us if the language of the statute is clear. Almost invariably, the language of the statute is argued to mean one thing by one side and another thing by another side. And where that is the case, legislative history——

Senator GRASSLEY. Are you going to be then turning to the legislative history that frequently, as you say that the statute is hardly ever clear?

Judge SCALIA. I will use what seems to me reliable legislative history when it is available to be used.

The trouble with legislative history, Senator, is figuring out what is reliable and what is not reliable. That is the trouble with it.

Senator GRASSLEY. Well, I want to tell you as one who has served in Congress for 12 years, legislative history is very important to those of us here who want further detailed expression of that legislative intent. All right.

You are not suggesting that for committee reports to have any meaning, that they must be actually written rather than merely approved by Members of Congress? Are you suggesting that?

Judge SCALIA. I do not want to pin myself down to a commitment to use any particular type of legislative history or not to use any particular type of legislative history. I am just saying I will not exclude it as a basis for my decisions as I have not in the past. And that it depends on what the significant legislative history is and how genuine a representation of the congressional intent it seems to be.

Senator GRASSLEY. Well, let me be a little more specific.

When you decide a case and look to the legislative history to help you, is it meaningless for a committee report to suggest that a court has misinterpreted an earlier statute?

Judge SCALIA. In the *Hirschey* case, which you are talking about, it seems so to me because the statute had not been changed. The statute was reenacted unchanged, although it would have been easy to clarify the provision that was ambiguous and that had been the subject of the earlier court decision.

What happened, it seemed to me, as best I could read the legislative history, was that the body as a whole had no intent concerning that earlier decision, probably did not even know of that earlier decision. But the committee at most, and perhaps only the committee staff for all one knows, did have views about that opinion and put it in the committee report.

But it is, of course, the view of the whole Congress that counts.

Now, if the act had been amended in some respect, and if this statement in the committee report were an explanation of why that amendment which came out of the committee was suggested, then it would have had more weight. But here the statute was enacted entirely unamended, and the statement in the committee report seemed to me almost a dictum. It had nothing to do with the bill that was on the floor.

Senator GRASSLEY. Well, I think the facts are that there were a number of changes made in successive reauthorizations to that legislation.

Judge SCALIA. No, I said unamended in the respect that had been the source of ambiguity which was the subject of the prior court decision. Yes, the act was amended in other respects, but there was no amendment to which this particular language in the committee report had any relevance.

Senator GRASSLEY. Would it be improper for Congress to ratify, so to speak, a correct court decision by stating that in the committee report?

Judge SCALIA. Can Congress ratify a court decision?

Senator GRASSLEY. Well, what I am saying——

Judge SCALIA. Senator, Congress does not act in committee reports. I will say that flat out. Congress acts by passing a law. The only value of the committee reports——

Senator GRASSLEY. I am speaking to the point of Congress accepting a view of a court decision and expressing that in the committee report. And then that being legislative history toward what Congress intended to some extent.

And I am talking about a correct interpretation.

Judge SCALIA. I think that the statement in the committee report would have to be an explanation of something that Congress did in the statute. If it were an explanation of something that Congress did in the statute, and it shows that what Congress did in the statute was based upon thus and such an interpretation of a prior or an acceptance of a prior opinion, then it would be of value.

Senator GRASSLEY. Well, suppose Congress sees two different court interpretations of the same statute, and Congress says this is the one that we intended?

Judge SCALIA. In the law? No problem.

Senator GRASSLEY. In the committee report as a statement of congressional intent?

Judge SCALIA. I would not think that was of any relevance unless Congress had done something in the law of which that statement in the committee report was an explanation.

Senator GRASSLEY. Suppose it is Congress' judgment that what we said 5 to 10 years ago is exactly what we intended and we still intend to say it, it does not need a change in the statute, and we are saying, as between two decisions, with opposing views, that this is the one we like.

What is wrong with that as a judgment by Congress telling the courts how we want the statute interpreted in the future?

Judge SCALIA. If I could know that that was what the whole Congress meant, there would be no problem about that at all. But I do not know it when all I see is a single committee report. I cannot tell if that is what the whole Congress meant just from looking at a single committee report where Congress has taken no action on the face of its statute to which that report is somehow tied, which that report explains where it is just passing a law. And the committee that happens to have jurisdiction over that area makes a comment——

Senator GRASSLEY. Obviously we are talking about a committee report that would follow legislative reauthorization or some other form of congressional enactment for that specific Congress by which the report came.

Judge SCALIA. My only point, Senator, is I do not think that that gives the committee the right to opine on all matters pertaining to that law, not to those matters which the committee is bringing before the full Congress.

And mind you, all I am seeking to do, and it is a problem for any judge using legislative history, is to try to figure out what the intent of the Congress is and to what extent this expresssion, whether it be on the floor by a single Senator, that is a problem sometimes too, or whether it be in a committee report, whether that genuinely represents what the whole body intended. So that we are sure that we are not disenfranchising the Congress and getting you, as a member of the Senate, committed to a position which in fact you knew nothing about and would disagree with.

Senator GRASSLEY. Well, the reason why I ask these questions is that I detect something in your writing, whether it is on the Gramm-Rudman law, the legislative veto, or this example I just gave, I sense a very critical view of how Congress tries to get things done. Do you think I am being too sensitive about it?

Judge SCALIA. Honestly, Senator, I have no criticism whatever about the way Congress tries to get things done. You can get things done any way you like, and that is your affair, and I understand the problems you confront in trying to get it done, the problems that you try to grapple with with the legislative veto, and the kinds of problems you are referring to that can be handled by committee reports.

No, I——

Senator GRASSLEY. Your background is primarily academic. You have also had a stint in the executive branch. But you never served in the legislative branch. And, of course, I am not suggesting that you should.

Judge SCALIA. I am sorry I did not, Senator. I frankly have gotten a good look at the territory of the law. The one slice of life I did not get a peek at was Hill work, although I dealt with the Hill to some extent when I was in the executive branch.

Senator GRASSLEY. I would like to ask if you think the fact that you have not served in the legislative branch might explain a lack of deference to the methods of the legislative branch in how we choose to do our job within the political constraints that we have to account for here?

Judge SCALIA. No; I do not think so, Senator, because some of the criticisms that I have made about committee reports, for example, have been made by Members of the Senate.

You certainly could not explain it that way as far as their criticism is concerned.

Senator GRASSLEY. But none of those Senators who might criticize the specific committee report that shows that same lack of respect for the committee report because they would be involved in the committee report and almost every piece of legislation that comes before them and that they have to vote on.

Mr. Chairman, I have no more questions.

The CHAIRMAN. Ask one more question. Oh, you are through.

We intended to take a recess right now. I understand they are going to have a vote in the Senate in a little bit. We have to take a recess then. So, if you do not object, we will go on for a few more minutes if that is all right with you.

Senator LEAHY. Mr. Chairman, could I just ask one question.

If the vote is put off, what will we do then?

The CHAIRMAN. We will stop for a recess. I will try to find out when the vote is coming.

Are you next?

Senator LEAHY. I am next. I just did not want to delay the committee.

The CHAIRMAN. You can go ahead now.

Senator LEAHY. Why do we not wait because Judge Scalia has also had a long time here?

Judge SCALIA. Well, I am amenable——

The CHAIRMAN. We want to save all the time we can. And he says he is willing to go on for a few more minutes.

I call on you now.

Senator LEAHY. Thank you, Mr. Chairman.

The Chairman is absolutely right in saying that the vote has been scheduled, but they keep putting it off and off and off. That is part of that legislative procedure that you and I have discussed in the past, too.

Judge Scalia, yesterday's Wall Street Journal quotes Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit as saying the words fairness and justice are terms which have no content.

I am interested in your views. Does the word "justice" have content to you?

Judge SCALIA. Yes; I think it has a content. I would be surprised if what Judge Posner meant was not simply that at least at the margins, and it is usually at the margins that we are talking when we have litigation in front of us, people disagree as to what justice requires.

But, you know, I believe it has content and fairness has content.

Senator LEAHY. I pass it along because it jumped out at me when I read that knowing that the first line in the Constitution says, "We, the people of the United States, in order to form a more perfect union and establish justice," and so on, that the——

Judge SCALIA. He should not have put it that way. He should have known better.

Senator LEAHY. I suspect he probably feels that way today too.

Senator HEFLIN. Maybe the Wall Street Journal should not have put it that way.

Senator LEAHY. Maybe the Wall Street Journal, Judge Heflin said——

Judge SCALIA. I am sure he does not mean anything different either, Senator.

Senator LEAHY. Judge Scalia, you have been an outspoken critic of the Freedom of Information Act. And you have written and spoken out against the 1974 amendments to FOIA.

At the time these amendments were passed, were you the Assistant Attorney General in the Office of the Legal Counsel?

Judge SCALIA. Yes; I was.

Senator LEAHY. Did you have an opportunity to review those amendments and recommend to President Ford whether he sign or veto those amendments?

Judge SCALIA. Yes; I did.

Senator LEAHY. What was your advice to President Ford?

Judge SCALIA. Is this public knowledge, Senator? I do not know. If it is not, I think I probably should not disclose it unless the President wants me to.

The President vetoed the amendments. And I think he set forth in his veto message what his principal concerns were. The major one was the requirement of the amendments that courts review de novo justifications for withholding national security.

Senator LEAHY. As you are saying, do you agree with that veto?

Judge SCALIA. You come to the same question that do I now——

Senator LEAHY. Do you now favor that veto?

Judge SCALIA. I do not have any views on such matters now, Senator.

Senator LEAHY. Did you agree with the veto at the time?

Judge SCALIA. I have no compunction in answering at all, except for the attorney-client relationship that I had——

Senator LEAHY. Let me just ask, in your own personal legal opinion, did that veto comport with your own personal legal views of the Freedom of Information Act?

Judge SCALIA. I think it comes to answering the same thing, and I really—I think I should not in deference to the attorney-client relationship I had with the——

Senator LEAHY. Well, without—and I am really not trying to find——

Judge SCALIA. I criticized those amendments, Senator. I think you have in front of you—I mean I am in print as having criticized those amendments.

I might also add, however, that when I was Chairman of the Administrative Conference of the United States, I testified before Congress in favor of proposed amendments to the Freedom of Information Act, and in favor of proposed application of the Freedom of Information Act by the agencies that were in the direction of liberalizing some disclosures. So I——

Senator LEAHY. But going to the 1974 amendments which you did write about and you spoke out against——

Judge SCALIA. Yes.

Senator LEAHY [continuing]. The President then vetoed the amendments which you wrote about, spoke out against.

Judge SCALIA. Yes.

Senator LEAHY. The Congress overwhelmingly overrode that veto. Because of that, would you have any difficulties in upholding the law as it is currently written?

Judge SCALIA. No; none whatever, Senator. I have upheld it as it is currently written. And I am not sure whether Congress simply overrode the veto or made—did they make one minor change before they overrode the veto?

Senator LEAHY. You vote up or down on the vote, Judge.

Judge SCALIA. OK.

Senator LEAHY. We do not even get a chance for the staff to go and write a report.

Judge SCALIA. That is right. I suppose that is right. They did override and not pass the amended bill.

Senator LEAHY. But when we discussed this, am I correct in summarizing our conversation that you said the law was clearly written, and that Freedom of Information Act cases which you have heard were never particularly difficult to resolve?

Judge SCALIA. But you must have misheard the latter. Some of the most—I can name a couple—some of the most complex cases I have had were FOIA cases. I think——

Senator LEAHY. Was that because of the facts or because of the law?

Judge SCALIA. Both. But probably more often the law.

Church of Scientology is one of the cases. I commend it to your attention as an incredibly complex opinion, both the panel opinion of the three judges, which I wrote, and the en banc court opinion which I wrote. It is one of the most complex pieces of statutory interpretation that I had to set my hands to.

Senator LEAHY. Do you find the Freedom of Information Act a clear act irrespective of how you may have felt about it, felt about the 1974 amendments? Do you find it a clearly written act?

Judge SCALIA. I would not—if you ask me for an example of a vague statute, the Freedom of Information Act is what I would—is not what I would immediately pick out. There are some areas where, after I guess a couple of decades of experience now, the statute could be made more precise. But if you ask me for a vague statute, that is not what I would mention as a prototype.

Senator LEAHY. Well, it was enacted before I was here so I have no fight with authorship one way or the other. I am not involved in it.

But I do want to—it is an act that keeps coming back to us, and it is one that I have been very involved with since.

And do I understand that the act is, as these acts go, a clear act? It is not a vague act?

Judge SCALIA. I do not know what you mean by a vague—almost any piece of legislation you can say that there are some areas that could be more specific. There are certainly some portions of FOIA that are like that. How specific Congress wants to be, you know, is always a question in every statute.

The problem with FOIA, Senator, is that unlike most statutes that Congress passes, it is not addressed to a single agency so, you know, it is addressed to OSHA or to the Food and Drug Administration. So that with such a statute even if it has a certain amount of vagueness, you are going to get a standardized interpretation by one single agency.

The problem with FOIA is that it goes out there to every agency in the executive branch. So to the extent that there is any vagueness at all in FOIA, that vagueness is going to have to be resolved at the district court level, because each agency might resolve the vagueness somewhat differently.

Now, the Justice Department tries to—at least it used to in the days when I was there—try to get the agencies to come up with a uniform interpretation. But I think you can say that there are special needs for precision when you have a statute that is a cross-cutting statute.

Senator LEAHY. But there is a lot of acts that go that way. A lot of your employment acts, employment practices, and so on are the same way.

Judge SCALIA. I think that is so. Although most of those are in much more detail—I have no particular—I do not know what you are driving at is what I am trying to say.

I suspect that there are some legislative proposals to——

Senator LEAHY. No; No. My concern about the FOIA, you will be having FOIA cases I am sure before the Supreme Court, where you were in opposition in 1974, and I want to know, in your mind, does that opposition create a problem for you in hearing FOIA cases now?

Judge SCALIA. No; Senator, I was asked that question earlier, I think when you were out of the room. And one of the things I said then, and I stand by it now, is that to the extent that I made significant law in the FOIA field, I have had a lot of FOIA cases—I do not know what the score is—but to the extent I have made significant law, I think it is in the direction of broadening access rather than restricting access.

Senator LEAHY. I will go back to the transcript of your earlier answer. One of the problems that happened to us in all these things, we have four or five matters going on at once. Around the corner the Appropriations Committee is meeting, which I also serve on——

Judge SCALIA. I understand that.

Senator LEAHY. Judge Scalia, do you recall—well, I recall that just last year the *Western Union Telegraph Co.* v. *FCC* as a case involving AT&T and MCI?

Judge SCALIA. Yes; I do, Senator

Senator LEAHY. Were you asked to recuse yourself in that case by any of the parties or litigants?

Judge SCALIA. No; I was not, Senator.

Senator LEAHY. In 1982, you were not on the bench, you had received a consulting fee from AT&T in an antitrust case between them and MCI.

Did you feel that that was close enough in time or significant enough in the involvement to call upon yourself to recuse yourself?

Judge SCALIA. No; I did not, Senator. I had not been counsel for AT&T—I mean I had not had a longstanding attorney-client relationship with them or anything like that. I had simply done a one-shot job of consulting with them I guess 2 years or so before I went on the bench, and the compensation may have been just the very year I went on the bench. And once before I had taught a seminar for some of their executives about communications law one afternoon. That was the only association I had with them.

It seemed to me that 2 or 3 years disqualification from AT&T matters would be more than enough to eliminate any appearance of impropriety. In all of these cases, of course, it is not just a matter of an interest on just one side and no interest on the other side. It is a cost to the court when I have to disqualify myself, of course, and it is unfair to the litigants. If there is no proper reason for disqualification, they are entitled to get a shot at the full bench of judges and not just hit the full bench minus one or two.

So I decided that I would recuse myself for a period of 3 years. I informed the clerk of the court that I would not participate in any AT&T matters. So that means that I am, as a practical matter, disqualified from all common carrier litigation which is a good chunk of D.C. Circuit business.

After 3 years, I instructed the clerk to put me back in the pool for AT&T cases.

Senator LEAHY. You did not agree with Mr. Friedman, the former dean of Hofstra Law School, who disagreed with your recusal?

Judge SCALIA. No, not at all, Senator. And I do not know anybody else that agrees with him either. I have had nobody that has told me that he or she thought that 3 years' worth of disqualification for that kind of prior financial connection with AT&T would not be more than enough.

Senator LEAHY. In another case, you wrote the decision in Block versus Meese which dealt with the labeling of foreign films as propaganda. One of the three films involved—let us see, one was an

Academy Award winning film on nuclear war, two dealt with acid rain. In the decisions, they said label them as propaganda.

Now, next term, as I understand it, the Supreme Court will hear a *California* case, not a *D.C.* case but a *California* case, dealing with the same issue and, in fact, the same films.

Is that one which you would feel that you should recuse yourself on?

Judge SCALIA. I have been thinking about that, Senator. What do you think? I think that is a close one. It is not the same case, it is just the same issue of law. But the case is really——

Senator LEAHY. I am not giving dissent. I do not think that I am on President Reagan's short list for a judicial nomination. Even though he would have a chance to get both an Irishman and an Italian at the same time.

Judge SCALIA. All I can say, Senator, is that I am thinking very hard about disqualifying myself from it. They are the same films, not the same parties in the litigation, but they are the same films, not just the same issue, but the very same films involved. I think I will probably disqualify myself, recuse myself.

Senator LEAHY. I might say only because——

Judge SCALIA. I would not want to argue to me in that case.

Senator LEAHY. Only because you had asked me the question on it, I would reach the conclusion that one should recuse himself.

Judge SCALIA. "In for a nickel, in for a dime," I may as well, yes, I will recuse myself, Senator. I feel uncertain enough about it that I do not think I ought to go near it.

Senator LEAHY. Look at it this way. If I were to get you out, I would have to watch the films again.

Judge SCALIA. I never watch the films that are part of litigation.

Senator LEAHY. Back in an area—and I would like to go into you served under Attorney General Levy, who conducted a pretty extensive review of the domestic security program of the FBI and the Justice Department. He ultimately issued guidelines as to the appropriate scope and conduct of domestic security investigations. They were revised by Attorney General Smith, but they are basically the same guidelines, the Levy guidelines are basically what we use today.

Judge SCALIA. I do not think so, Senator.

Senator LEAHY. No?

Judge SCALIA. No.

Senator LEAHY. Well, how do they differ today?

Judge SCALIA. Well, I do not know the extent of the difference. All I know is that the intelligence community so-called did not like the Levy guidelines at all, and that the Smith guidelines were thought to be the more acceptable. I know there are differences. I do not know what they are.

Senator LEAHY. Wearing another hat, I deal with those same intelligence agencies, and I do not see an awful lot of difference. That is why I was curious what you might.

Judge SCALIA. I have been out of that field for a long time except that I know that some of my former associates in the intelligence community clearly did not love the Levy guidelines. And I thought that some of the impetus for the changes was from those people.

Senator **Leahy**. Did you work on the development of those guidelines?

Judge **Scalia**. I believe that Mary Lawton, who was my deputy at the Office of Legal Counsel, was the prime worker with the Bureau and the other intelligence agencies in developing the guidelines.

Senator **Leahy**. Who is still involved in that field?

Judge **Scalia**. I am sure Mary has now gone on from the Office of Legal Counsel to I think a whole new post just dealing with intelligence matters.

Senator **Leahy**. Did you have any occasion during that time to consider whether Congress had the constitutional authority to legislate restrictions on the scope and conduct of such investigation?

Judge **Scalia**. Did I have any? I do not think I had any occasion to consider it, Senator, because I do not think there is any question that Congress does.

Senator **Leahy**. I am sorry, I did not hear the last.

Judge **Scalia**. I am not aware that it was ever in question that Congress had authority to act in the field.

Senator **Leahy**. Was the FBI's Cointelpro Program underway when you joined the Justice Department? I am having a little trouble recalling myself when it ended.

Judge **Scalia**. Oh, I am sure it was all over by then, Senator.

Senator **Leahy**. Did you have any occasion in the Office of Legal Counsel to render an opinion as to the scope or the authority or the legality of domestic security investigations generally that you recall?

Judge **Scalia**. Not that I recall, Senator. Not that I recall.

Senator **Leahy**. In the standard questionnaire, an area that I always find of interest, judges were asked, "What actions in your professional and personal life evidence your concern for equal justice under the law"?

And you answered the question in part by referring to your work in support of legislation to overturn the document of sovereign immunity.

Can you describe the kind of work you did as Assistant—I am sorry, Mr. Chairman. I did not realize my time was up.

The **Chairman**. Your time is up.

The distinguished Senator from Alabama.

Senator **Heflin**. Judge Scalia, Senator Grassley asked you about legislative history, bearing down hard on the issue of the committee reports.

I have had the privilege of reading some of your writings, including a speech that you delivered in the fall of 1985 and the spring of 1986 at various law schools.

Judge **Scalia**. That was the speech, Senator.

Senator **Heflin**. A speech on the use of legislative history. And just to refresh your recollection, because I sort of agree with you on the priority that you give to the committee report, you quote from a Senate debate, a floor debate, on a tax bill in 1982 where Senator Armstrong and Senator Dole are involved. Senator Armstrong points out the fallacies of what the committee report does, and how often it—just for everybody's edification, he asked him, did any Senator write the committee report? And Dole answered, I would have to check. Does the Senator know of any Senator who wrote the committee report? He said he might be able to identify, but he would have to search. But he goes on to say staff.

And he said, "Has the Senator from Kansas, the Chairman of the Finance Committee, read the committee report in its entirety?"

And Senator Dole answers: "I am working on it; it is not a best-seller, but I am working on it."

And then he said, "Did the members of the Finance Committee vote on the committee report?"

Senator Dole says, "No."

Senator Armstrong says: "Mr. President, the reason I raise the issue is not perhaps apparent on the surface. Let me just state this: The report itself was not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the U.S. Senate."

And you mentioned—I mean, and Senator Armstrong goes on, and he says, "If any jurist or administrative bureaucrat, tax practitioners, or others, who might chance upon the written record of this proceeding, let me just make the point that this is not the law. It is not voted on. It is not subject to amendment. We should discipline ourselves to the task of expressing congressional intent in the statute."

That is from the Congressional Record, July 19, 1982.

You state, ironically, but understandably enough—this is in your speech—the more the courts have relied upon committee reports in recent years, the less reliable they have become.

And then at the end of your speech, you state this: "For the purpose I suppose I would rank most highly legislative history consisting of amendments defeated on the floor, where it appears clear that the reasons for the defeat was a rejection of a particular course, now said to be contained in the unamended text.

"I suppose next to that would be extended Floor debate, at least in circumstances which occasionally occur, where the final text is actually being crafted on the floor."

And then you state: "At the bottom of my list I would place what heretofore seems to have been placed at the top, the Committee report."

So I think you have expressed pretty well in your speech the reason why the committee reports are not given a great deal of credence relative to legislative history.

Judge SCALIA. I am glad Senator Grassley is not here, Senator.

Senator HEFLIN. Well, maybe his staff will tell him, and I will talk to him about it. But I thought that might be interesting to clarify, and why I think, frankly, that there has been too much reliance by congressional bodies on the committee report. I have been one that has been arguing that that is a wrong practice.

Let me ask you this: In the Washington University Law Quarterly, you stated in an article entitled, "The Disease as Cure"—this is a commentary on the—in order to get beyond racism, we must first take account of race—you state: "I am, in short, opposed to racial affirmative action for reasons of both principle and practicality."

And you went on to say that: "I strongly favor what might be called, but for the coloration the term has acquired in the context of its past use, affirmative action programs of many types of help for the poor and the disadvantaged."

Judge, would you define what you meant by principle and practicality in the first quote, and what type of affirmative actions you do favor?

Judge **Scalia**. As to the latter, I think what I was saying was—let me set it in context once again, Senator. This was not when I was a judge. It was a speech I gave—in fact it was on a panel on which now-Judge Edwards, who was then also an academic at the University of Michigan, and it was a panel about affirmative action as a policy; not its constitutionality; not its legality. And I was speaking as, in those days, a law professor who could have views on such policy matters.

When I said I would favor certain types of affirmative action programs, I was referring to affirmative action programs in favor of the poor and disadvantaged, even when it turned out that every one of the poor people or every one of the disadvantaged people favored by a particular program turned out to be of a particular race. I said that, of course, would make no difference.

But the basis for the affirmative action, the basis for the favoritism was the poverty or the disadvantage.

What I expressed myself in opposition to, on policy grounds, was favoring a group solely on racial or ethnic grounds, and not on the basis of poverty or disadvantage.

As to the practical and principled problems I found with the latter type of affirmative action, one of the things I mentioned—I guess the two things are, No. 1, when you favor one person because of his race, you are automatically disfavoring another one because of his race.

And I think the second consideration I pointed out was that to an extent it deprives the members of the race who are given a special advantage of the fruits of their labors, because they are sometimes regarded as having achieved those fruits only because of affirmative action, whereas they could have made it without it. And there is no way that they can demonstrate that.

Those are, as I say, policy views of mine at the time. I think they are views held by other reasonable people. They are views disagreed with by the Congress. And that is why one has a Congress. Those views have nothing to do with the way I will apply whatever affirmative action laws are enacted by the Congress.

Senator **Heflin**. In your questionnaire, you list your various positions, jobs. You mention in—quoting from page 13 of your questionnaire, it says:

> In my final executive post as Assistant Attorney General for the Office of Legal Counsel, September, 1974, to January 1977, I was legal adviser to the Attorney General, and through him, directly to the executive branch. The Office of Legal Counsel drafts the Attorney General's opinions; much more frequently issues its own opinions under the Attorney General's delegated authority to the White House or executive agency. The questions I dealt with were multifarious, covering all aspects of Federal constitutional or statutory law.

Then you say the job also involved a substantial amount of congressional testimony on such issues as executive privilege and a legislative veto.

I wonder if you recall any of the congressional testimony pertaining to executive privilege, to whom it was given in Congress, House or Senate, and the committee, or any time pertaining to that?

Judge **Scalia**. Senator, unless I am mistaken, it was both before the Senate and the House. I think it was before Judiciary in both Houses. But I am sure I can get that for you. I am sure it is all a matter of public——

Senator **Heflin**. You remember what the issue was about, or how the circumstances arose?

Judge **Scalia**. I think mostly it was executive privilege in general; the whole doctrine of executive privilege was then at issue with regard to a number of different matters that the Congress had on the stove with the executive.

And I do not recall right now any specific issue of executive privilege, where it involved the withholding of any particular document or set of documents and where I was testifying.

But I can get it for you. I am sure there is a record of it. All that testimony——

Senator **Heflin**. Well, I am sure there is a record. I thought maybe you might give us enough to identify where we might look to see what you might have said pertaining to that particular time.

You do not remember what the issue was that brought you to Congress?

Judge **Scalia**. No, at the time, Senator, I remember—I think I was on a panel. I think it was a panel before a committee concerning whether there was any such thing. This was before the Supreme Court's decision in *United States* v. *Nixon,* so there had been no court decision which, in so many words, had affirmed the existence of such an animal as executive privilege. And it was a matter of great interest to the Congress at that time.

I was on a panel, as I recall, with Raoul Berger from Harvard who was an opponent of the existence of any executive privilege.

Senator **Heflin**. Do you remember whether or not your President at that particular time, the time you were Assistant Attorney General, Office of Legal Counsel, whether or not he had issued an Executive order which, in effect, expressed the viewpoint that cooperation with Congress should be followed, and that Congress should be allowed to see all documents except, and then list the exceptions?

At the time, the President whom you were serving under, whom I assume was Ford—were you also under Nixon?

Judge **Scalia**. No, I did not serve under President Nixon. He was out of office before I was confirmed.

Senator **Heflin**. Did President Ford at that time issue any Executive order which in effect described and limited the use of executive privilege?

Judge **Scalia**. Yes, Senator, but not in the manner in which you describe. The way it was limited was not describing the subject matters, but rather, describing the procedure for its assertion. And the procedure was a rigorous one. It could not ultimately be asserted by an executive officer without, as I recall, the approval of—I think it required the President's personal approval before it could be asserted.

So it is a big deal, the executive branch does not take it lightly.

Now, very often, when an agency is asked for documents, it will say, we are reluctant to turn them over. And there is a preliminary process of negotiation. But if it really comes down to hard core, adamant positions on both sides that cannot be resolved, before the agency can say, we will not comply with this subpoena for the documents, we will not turn them over, the procedures required that there be—as I recall it—approval by the President with the advice of the Attorney General on the matter.

And as far as I know, I am quite confident that that is still in effect, or something like it. We did not take it lightly, Senator. It is always a regrettable confrontation between the two branches.

The CHAIRMAN. Mr. Short, we have got a vote on.

Mr. SHORT. Yes, sir. The chairman would like you to recess if you are through.

Senator HEFLIN. All right.

Senator LEAHY [presiding]. What we are qoing to do is, once you have finished your questions, is to recess, because we are also going to have a meeting of the Judiciary Committee.

Senator HEFLIN. Well, I have several other questions I want to ask. If I still have time, I would rather come back and do it.

Senator LEAHY. How much time does Senator Heflin have?

Mr. SHORT. Well, we still have time before the 5-minute vote.

Senator HEFLIN. I have 15 minutes left. I did not take but 5.

Mr. SHORT. You have 5 minutes left.

Senator LEAHY. You have 5 minutes left.

Senator HEFLIN. That is wrong.

Senator SIMON. Just one inquiry. Are we going to recess and come back in later this evening, or come back tomorrow?

Mr. SHORT. Only until 5:15, Senator. We will recess until 5:15.

Senator SIMON. 5:15, OK.

Mr. SHORT. And we will start again at 5:15.

Senator HEFLIN. In other words, we are going to recess now until 5:15?

Mr. SHORT. Yes, sir.

Senator LEAHY. Unless you want to finish your 5 minutes.

Senator HEFLIN. No; we will recess now.

Senator LEAHY. Then, we will recess then. And this might be an indication, Judge Scalia, that notwithstanding the dire prophecies that you were going to be faced with a mass of vultures up here, it shows you how relaxed everybody has been if it has come all the way down to having me as acting chairman at this point.

We will stand in recess until quarter past five.

[Recess.]

The CHAIRMAN. The question arose about certain documents that the Democrats want to see, that are contained at the Justice Department, concerning Justice Rehnquist.

I appointed the able and distinguished Senator from Nevada, Senator Paul Laxalt, to work with the Democrats to see if it could be worked out.

They have reached an agreement, and I am going to request Senator Laxalt now to announce the agreement.

Senator LAXALT. I thank the chairman.

We have been working for several days—and by we, I mean most of the members of this committee—in an effort to try to work out a compromise in connection with the requested documents.

And what we have had is a classic conflict between the executive and the legislative branch.

Very frankly, the problem was not so much a lack of cooperation on the part of the Executive; they wanted to cooperate. But they did not want, in the process, to create harmful precedents or to get in the way of the whole executive privilege doctrine.

So it was a matter of scope what documents would be produced under what circumstances.

And after endless negotiations—actually, when I look back on it, I think the Marcos mission was a cakewalk compared to this one. As someone pointed out, I did have several more Marcoses to deal with in this situation.

But we have finally arrived at an agreement defining the documents that will be made available by Justice to the membership of this committee and certain staff. That examination will be conducted immediately starting tonight, and sometime tomorrow the Senators will be meeting to discuss staff recommendations and questions.

The long and short of it is that the conflict has been resolved. In my objective opinion, the needs and desires of this committee and the legislative branch to conduct a full and complete inquiry has been properly balanced by the need of the Executive to protect confidential and sensitive documents within the exercise of executive privilege.

So what we essentially have here is the rolling back, a limited release of the imposition of executive privilege. And I think, Mr. Chairman, that we have a good compromise, and I would like to compliment and thank and commend the various colleagues that worked with me for these last several days.

Senator BIDEN. Mr. Chairman.

The CHAIRMAN. Go ahead.

Senator BIDEN. Mr. Chairman, I would like to publicly compliment Senator Laxalt. I, quite frankly, think it was Senator Laxalt's diligence in this matter that allowed a result to be produced. Because everyone trusts him. The administration trusts him; I trust him; all my colleagues trust him. No. 1.

No. 2, you should not be misled by the comments of the Senator saying, limited access. We are getting an access to all we asked for. Everything we asked for is being made available under the circumstances. When I say everything, I mean everything in the last request, there were seven categories we set out.

Senator LAXALT. I was speaking of the first request, which was much broader.

Senator BIDEN. I know. I just did not want the press to come up and say, well, what did you not get that you wanted. From our standpoint, from my standpoint, the administration is not holding back anything that is relevant to our inquiry here. As you pointed out, there have been several staff designees, three in the majority, three in the minority, who will get a chance to look at this. And every Senator has a right to look at them. And I know that we intend on looking at them. We will late tomorrow afternoon or early evening, do a final review of those documents.

And the last point I would like to make is that in fact it was not merely Democrats who were requesting these documents. There were 10 people on this committee, including two Republicans, who felt it was important that these documents be produced.

I compliment again my colleague, Senator Laxalt, and the chairman for his good judgment in appointing Senator Laxalt, and the Justice Department for cooperating. And as far as we are concerned, unless any of my colleagues wish to speak, the matter has been amicably resolved.

Senator **Kennedy**. Just for a moment, Mr. Chairman, and I will not delay our consideration of Judge Scalia. But as one of the members on this side that initially requested these documents, and as one that made the statement that the administration's position of executive privilege is basically stonewalling the committee and the American people, and permitting the Senate of the United States to perform its function in advising and consenting under the Constitution on the particular nominee, I welcome the reversal of the administration to those requests.

I believe that these requests were not being made in behalf of individuals. They are being made in behalf of the Senate Judiciary Committee, in behalf of the Senate, and in behalf of the American people, so that we could fulfill our function. We will have an opportunity to examine the various documents, the memorandums, the various notes—all of the information relating to matters from which Mr. Rehnquist had recused himself as a Supreme Court Justice—the May Day demonstrations, wiretapping, the whole *Laird* v. *Tatum* case, and other measures involving civil rights and civil liberties.

I believe that this is a very substantial victory for the Constitution and for the constitutional process, and for the American people and for the Senate. So I regret it has taken us the several days to get this far, but I welcome the fact that we are here, and I, too, want to join in commending those who spent the time and effort to assure that we were going to gain that measure.

I want to make it very clear at the outset, in reviewing the various holdings on the issue of executive privilege, I did not feel that the arguments that were being put forward by the Office of Legal Counsel held water. I do not think it holds water on the requests that have been made by Senator Nunn in terms of trying to gain various information with regards to our negotiating position on ABM—the Soviets have it—the negotiating debates and discussions and notes—we, the Senate of the United States were denied it. And I welcome the fact that we have made progress in this area, and I am very hopeful that the soundness and the responsible attitude which has been assumed now by the Department will apply to other areas so that we can truly fulfill the mandate of President Reagan when he said that when information is requested by the various committees in order to fulfill their responsibilities, they will be able to receive it.

I thank the Chair.

Senator **Metzenbaum**. Mr. Chairman.

The **Chairman**. Senator Metzenbaum.

Senator **Metzenbaum**. Mr. Chairman, I just want to say publicly that I think the American people owe a great debt of gratitude to the Senator from Nevada, Paul Laxalt, because there is no secret that this issue and confrontation on the matter of executive privilege was rapidly escalating to the point where it was about to becloud the entire question of the confirmation of Justice Rehnquist. And I feel certain that if Paul Laxalt had not inserted himself into the issue, at the request of some of us, I think it would have gotten out of hand; I think it would have proceeded to the matter of subpoenas, and the entire unraveling of that kind of issue.

I think Paul Laxalt has served the Nation well in not permitting that to develop. I think the President owes him a great debt of gratitude, and as his reward, I think he ought to send him to South Africa to get some matters resolved over there.

I think that is a fine way for you to conclude your career in the Senate, Paul, but you have done a great job on this, I will say that.

Senator **Laxalt** Thank you, Howard. You are all heart. [Laughter.]

The **Chairman**. Any other comments?

Senator **Heflin**. I will tell you, if you do not quit talking like that, you are going to give him a big head; he might decide to run for President. [Laughter.]

The **Chairman**. When I spoke a few minutes ago about the Democrats asking for documents, I should have said "a majority of Democrats." There were two Republicans on our side, Senator Specter and Senator Mathias, and I want to make that correction.

Are there any other comments?

[No response.]

The **Chairman**. If not, now, we will continue with the hearing.

Senator Laxalt, we thank you again for your good work.

Senator **Laxalt**. Thank you, Mr. Chairman.

The **Chairman**. Senator Heflin, I believe you have 5 minutes remaining.

Senator **Heflin**. Judge Scalia, a lot has been written in the paper about your belief in federalism, and the early decisions of the U.S. Supreme Court certainly recognize the essential role of the States in our Federal system of Government.

Justice Chase, in the case of *Texas* v. *White,* declared that the Constitution, "all of its provisions look to an indestructible union composed of indestructible States." And of course, the 10th amendment, we know about that.

I would like you to give us your general philosophy of the role of the judiciary relative to federalism.

Judge **Scalia**. Well, I can give you my view of what it has been up to now, anyway, or at least in this century. The fact is, it seems to me, that the primary defender of the constitutional balance, the Federal Government versus the States—maybe "versus" is not the way to put it—but the primary institution to strike the right balance is the Congress. It is a principle of the Constitution that there are certain responsibilities that belong to the State and some that belong to the Federal Government, but it is essentially the function of the Congress—the Congress, which takes the same oath to uphold and defend the constitution that I do as a judge, to have that constitutional prescription in mind when it enacts the laws.

And I think the history of this century, at least, shows that by and large those congressional determinations will be respected by the courts.

Senator HEFLIN. Well, there are certain people of diverse ideologies that seem to embrace the concept of one Federal legislative act as the cure for any major problems. These widely diverse groups, the extreme liberals and the extreme right-wingers, seem to at least agree on the fact of trying to find a single cure for problems that they consider to be monumental problems.

For example, the extreme right now seems to want a Federal cure in the area of abortion, gun control, tort reform, labor violence.

Does your belief in constitutional government include a belief that there should be a deference to the States in seeking solutions in areas that traditionally and historically have been considered to be in the jurisdiction of State government?

Judge SCALIA. Certainly as a member of the legislature, Senator, that would be my view. I think my writings show that, that I take seriously one of the checks and balances, which are the ultimate protection of individual liberties in the Constitution—one of them is the fact that you have not just a unified, centralized Government, but also 50 independent States, and that the work of Government is divided between those two entities.

As to whether that question is of much relevance to me in the vast majority if not all of the cases I have to decide, that is quite a different issue. I think what I am saying is that on the basis of the court's past decisions, at any rate, the main protection for that is in the policymaking area, is in the Congress. The court's struggles to prescribe what is the proper role of the Federal Government vis-a-vis the State have essentially been abandoned for quite a while.

Senator HEFLIN. You do not care to comment on what you think from a position of being a member of the judiciary would be, as opposed to legislative, as you have stated?

Judge SCALIA. I think that is right, Senator. I think what the Supreme Court decisions on the subject show is that it is very hard to find a distinct justiciable line between those matters that are appropriate for the States and those that are appropriate for the Federal Government, that finding that line is much easier for a legislator than for a court, and by and large the courts have not interfered.

I expect there will be more arguments urging that they do so in the future, and I will of course keep an open mind.

Senator HEFLIN. Let me ask you about an issue. You have spent some time as head of the administrative conference and have written a good deal on administrative law and have taught administrative law.

We now have a situation where we have administrative law judges. The administrative law judges outnumber the U.S. district court judges and the circuit court of appeals judges, I believe, more than 2 to 1—something in that neighborhood, and these are approximate ballpark figures, of about 1,400 administrative law judges as opposed to about 700 of the other type judges.

Senator SPECTER [presiding]. Senator Heflin, if I might interrupt you, your time has expired. You may finish this question and proceed with the answer.

Senator HEFLIN. Well, there have been proposals to try to establish an independent corps of administrative law judges. Do you have any opinions relative to proposals to establish an independent corps of administrative law judges?

Judge SCALIA. I wrote an article some years ago, Senator, in which I essentially supported the concept of a corps of administrative law judges, but the quid pro quo for establishing the corps—right now, of course, each agency has its own judges; the corps proposal is that there be a central depository of administrative law judges, in ALJ court, in effect, which would decide cases from all agencies with maybe specialized panels of that court. I wrote a piece that thought that that concept was worth exploring, provided that what went along with it would be the understanding that all administrative law judges would not all be the same grade level, as they now essentially are in each agency. And in most agencies, it is a very high level.

It seemed to me in that article, at least, that what we should be moving for is a career administrative judiciary, which is what most other legal systems have, so that you could—many of the administrative matters that need to be decided do not take as experienced, as seasoned, as knowledgeable, as expert a judge as a major ratemaking case, and it would make sense to have judges of varying degrees of experience and hence varying grade levels who can work their way up through the corps and ultimately be assigned to the most difficult cases.

Senator SPECTER. Judge Scalia, as I had suggested in a very brief opening statement, the questions that I have for you are limited to what I consider to be the "rockbed" propositions on the authority of the Court to decide questions of finality on the interpretation of the Constitution, as decided in *Marbury* v. *Madison*. This includes the issue of the Court's jurisdiction to make those decisions in the context of efforts by Congress to circumvent the court's power by cutting off jurisdiction. Another concern I hate is the issue of the incorporation doctrine.

Starting with *Marbury* v. *Madison*, I believe you testified earlier that this case, which establishes the basic power of the Supreme Court to decide the final interpretation of the Constitution, is a settled issue as far as you are concerned?

Judge SCALIA. I said, Senator, it is a pillar of our system. I do not want to say that anything is a settled issue as far as I am concerned. If somebody wants to come in and challenge *Marbury* v. *Madison*, I will listen to that person. But it is obviously a pillar of our current system.

Whether I would be likely to kick away *Marbury* v. *Madison*, given not only what I have just said, but also what I have said concerning my respect for the principle of stare decisis, I think you will have to judge on the basis of my record as a judge in the court of appeals, and your judgment as to whether I am, I suppose, on that issue sufficiently intemperate or extreme.

But I really do not want to say with respect to any decision that I would not listen to a litigant who wants to challenge it. I invite you and urge you to make your judgment. I think the question you are asking is quite a relevant question, and I would not want to confirm anybody that I believed would destroy certain decisions. But I think the way you have to come to that judgment is on the basis of my past record as a thoughtful moderate lawyer and judge, and on the basis of my writings and my records in the past.

I do not want to be in the position of saying as to any case that I would not overrule it.

Senator SPECTER. Well, you have just used a magic word, Judge Scalia—"moderate". Do you consider yourself a "moderate" judge?

Judge SCALIA. I suppose everybody considers himself a "moderate", Senator, I do.

Senator SPECTER. Well, I do not know about that——

Judge SCALIA. Well, maybe everybody does not. I do, anyway.

Senator SPECTER. I think you have come pretty close to saying that you consider *Marbury* v. *Madison* an indispensable part of constitutional law in establishing the authority of the Supreme Court of the United States to interpret the Constitution, but you have not quite said it. You said it is a pillar.

Judge SCALIA. It is certainly an essential part of the system that we now have.

Senator SPECTER. Well, I will infer "yes" from your answer, although you have not directly said it. I think maybe I even say you have implied it.

Let me move on to the issue of the jurisdiction of the Court. I am appreciative of the fact that that is an issue which could come before the Court. I hope it does not. There is ex parte McCardle, and *United States* v. *Klein;* and I am sure you are familiar with the line of questioning that I undertook with Justice Rehnquist on that subject.

It seems to me that where you have the issue of jurisdiction, and Congress can legislate and say that the Supreme Court of the United States no longer has jurisdiction, for example, on first amendment rights of speech, press, and religion, that the pillar of our system is gone. The result is that the Court no longer has the authority to decide constitutional questions.

Thus, let me ask you the question that Justice Rehnquist did answer, without any binding promises. Do you think that the Court would have to have the authority, even in the face of a congressional enactment trying to take away its jurisdiction, to retain the power to decide the fundamental questions of first amendment—speech, press, and religion?

Judge SCALIA. Senator, I am afraid I am at the same place on that that I was on *Marbury* v. *Madison.* In fact, I think ex parte McCardle was probably described too generously as being a decision of the Supreme Court that seemed to indicate on the one hand that the jurisdiction could be taken awav entirely, and then *United States* v. *Klein* suggesting to the contrary. Ex parte McCardle actually did not quite go even so far as to allow the jurisdiction to be taken away. It allowed the habeas corpus jurisdiction to be taken away under one statute, and the Court went to some pains in the opinion to point out that this is not to say that there is no habeas corpus relief at all. There is just no habeas corpus relief under the particular statute as to which Congress had withdrawn it.

So I do not think that there is an opinion on the books that is even as possibly antagonistic to your view as ex parte McCardle has been described.

I share your concern with the ability of Congress to remove jurisdiction entirely from the Supreme Court. It is obviously a jolt to the system, to put it mildly. I just do not want to be, and do not think I properly can be, in a position of saying that I would rule unconstitutional any piece of legislation that does that. Again, I think I must ask you to judge what I am likely to do on the basis of your estimation of my legal views, my loyalty to the meaning of the Constitution as you understand it.

Senator SPECTER. Would you say that the jurisdiction of the Court on speech, press, and religion is a pillar of our system?

Judge SCALIA. I think the jurisdiction of the Court on any matter, is obviously a pillar of the system that we have.

Senator SPECTER. All right. You are talking about pillars; you are putting it on the same level as *Marbury* v. *Madison,* so that that is an advance.

Judge Scalia, the problem that I find with the limitation as to what you are willing to testify about is that it does not give a commitment to certain very basic principles. I have not asked you to go very far, and I would not, as I do not think there is any doubt about your confirmation as we are sitting here at the moment. But there is a real problem institutionally because of the attitude and the responses which you give—and I respect them totally. I am not asking you what you are going to decide with respect to controversial issues that you know are going to be coming up, where if you answer one way, you are going to make one group of Senators mad, and if you answer another way, you are going to make another group of Senators mad. I am basing this on *Marbury* v. *Madison* and the jurisdiction of the Court, as pillars. The question I have for you is how does a Senator make a judgment on what a Supreme Court nominee is going to do if we do not get really categorical answers to fundamental questions like that?

Judge SCALIA. I think it is very hard, Senator, when you are dealing with someone that does not have a track record, where you cannot read that individual's opinions in the past dealing with the important features of the Constitution and of statutes, seeing how that person deals with the materials, seeing that person's veneration for the important principles that you are concerned about.

In my case, you have 4 years of that; you have extensive writings on administrative law and constitutional law from the years when I was a professor; you have testimony and statements that I made when I was in the executive branch.

I am as sympathetic to your problem as you said you are to mine. I think at least in the present circumstances, as I see my responsibilities anyway, my problem with answering the easy question, Senator, is that what is an easy question for you may be a hard question for somebody else. And as I commented earlier, it is not a slippery slope; it is a precipice. *Marbury* v. *Madison,* we all agree about, jurisdiction of the court; it goes from one to the next. And I am very unable to say this is the line where it suddenly has become a doubtful question. That indeed is prejudicing future litigants, who should be able to come up and argue that we have seen—you know, *Plessy* v. *Ferguson* might have been considered a settled question at one time, but a litigant should have been able to come in and say, "It is wrong," and get a judge who has not committed himself to a committee as a condition of his confirmation to adhering to it. That is what I am struggling with, and I hope you have enough material to judge my reasonableness and my fidelity to the Constitution to assure you that on matters that you consider "rockbed" and that are "rockbed", I would not pull the structure down.

Senator SPECTER. Let me give you an absurd hypothetical. Suppose someone wanted to litigate your responsibility under the oath you will take to uphold the Constitution. Would you hear litigants on that question?

Judge SCALIA. I will hear a litigant in my present court on any question, Senator, and I have heard some fairly far—out arguments. In the Supreme Court, I will not have to do that, because we have some option as to whether we decide to take a case or not. But in theory, I think I have to make myself available to any argument.

Senator SPECTER. Let me take this one step further. If you are confirmed, will you take an oath to uphold the Constitution?

Judge SCALIA. I certainly will.

Senator SPECTER. Of course you will. Will you let somebody litigate, after you are on the Supreme Court, the question of whether you have an obligation, under your oath, to uphold the Constitution?

Judge SCALIA. I think you have finally gone over the edge of absurdity so much that I have to say: Of course not.

Senator SPECTER. Well, wonderful. We have gotten a finale.

Judge SCALIA. I am on the precipice, you are telling me, now.

Senator SPECTER. Now, that is a definite answer, and a conclusive answer, and that is a commitment.

As I review the answers by Supreme Court Justice nominees, there has been a large number of exceptions where nominees simply do not answer questions. I think that is justified in the highly controversial settings where it is imminent that that question is going to come up, and there is sharp difference of opinion on it—and maybe on more practical grounds, where getting into those areas is going to place the nomination in jeopardy in terms of the confirmation process.

I believe very firmly that if you are talking about the issues we have discussed so far, *Marbury* v. *Madison*, the authority of the court, or the jurisdictional issue, that we really ought to be able to have those answered positively in terms of commitment.

But your failure to answer it is not going to cause me to vote against you.

Judge SCALIA. Well, I hope not, but I do not want you to think less of me for failure to answer. I thought about this issue a long time, because the one thing you know is going to come up in every judicial confirmation hearing, in particular Supreme Court confirmation hearing, is this issue of what questions can you answer; and it is a constant problem, and I realize that some nominees have tried to answer some questions and not answered the other. I thought long and hard about that problem, and I came to this conclusion, that if indeed it is obvious, then you do not need an answer, because your judgment of my record and my reasonableness and my moderation will lead you to conclude, heck, it is so obvious, anybody that we think is not a nutty-nutty would have to come out that way.

If, on the other hand, it is not obvious, then I am really prejudicing future litigants. So taking all that balance into account, I just concluded that the only safe position that I can take in conscience is to simply not say that there is any particular case regarding which I would absolutely vote against a litigant who urges a position that is contrary to it.

Senator SPECTER. Well, the problem with that, Judge Scalia, is that if we take what is obvious, then we look at your record, we look at your writings, and we do not need a hearing.

Judge SCALIA. Well, no, no. I think you have to look at my writings and ask me about my writings and test those writings to see what I meant about some elements of them. I have been questioned about cases that I have written, and I am happy to respond to answers about what they meant, and why what I said in them or what I did in them is not bad. I have been very open on those, and will continue to be. It is just predictions as to how I will vote in the future that I am drawing the line at.

Senator SPECTER. Let me ask you questions about the incorporation doctrine, because I want to put those in the record.

Would you say that the double jeopardy clause of the 5th amendment is incorporated under the due process clause of the 14th amendment, as decided in 1969 in *Benton* v. *Maryland?*

Judge SCALIA. Yes; I will say that is an accepted part of current law.

Senator SPECTER. Would you say that the self-incrimination and just compensation clauses decided in *Malloy* v. *Hogan* and *Chicago B&O Railroad* v. *City of Chicago,* respectfully, are a settled matter of, constitutional law?

Judge SCALIA. They certainly have been clearly settled by the Supreme Court.

Senator SPECTER. And would you say the same thing as to the incorporation of the clauses of assembly and petition, press, speech, and religion; that the 14th amendment due process clause incorporates them?

Judge SCALIA. Indeed. It would be quite a jolt to the existing system to suddenly discover that those series of protections against State actions do not exist.

Senator SPECTER. What about the speedy trial, public trial and jury trial provisions of the 6th amendment; are they incorporated under the due process clause?

Judge SCALIA. Indeed.

Senator SPECTER. And impartial trial, notices of charges, confrontation, compulsory process, right to counsel, under the 6th amendment; are they incorporated by the due process clause of the 14th amendment?

Judge SCALIA. That is what the cases have held, and it would be a massive change to go back on them.

Senator SPECTER. And similarly, is the cruel and unusual punishment clause of the 8th amendment, incorporated by the due process of the 14th amendment?

Judge SCALIA. The same answer, Senator.

Senator SPECTER. Would you say those would come under the category of "pillars of constitutional law"?

Judge SCALIA. *Marbury* v. *Madison* is a pillar; if that is a pillar, I do not know what—I would just say it is a very accepted and settled part of our current system, and it would be an enormous change to go back.

Senator SPECTER. Thank you, Judge Scalia.

Senator Metzenbaum.

Senator SIMON. Mr. Chairman.

Senator SPECTER. Senator Simon.

Senator SIMON. Oh, maybe Senator Metzenbaum has not——

Senator SPECTER. Senator Metzenbaum has not had his round yet, Senator Simon.

Senator SIMON. I apologize. I thought he had had his questions. I am sorry.

Senator METZENBAUM. Judge Scalia, in an article—I might say parenthetically, you have been very patient; this has been a long day, and you must be a bit weary, and your family must be wearier, and I am glad the younger members went home—in an article entitled, "The Judges are Coming," you made this statement:

> It would seem to be a contradiction in terms to suggest that a State practice engaged in and widely regarded as legitimate from the early days of the Republic down to the present time, is unconstitutional. I do not care how analytically consistent with analagous precedents such a holding might be, nor how socially desirable in a judge's view. If it contradicts a long and continuing understanding of the society, as many of the Supreme Court's recent Constitutional decisions referred to earlier, in fact, do, it is quite simply wrong.

The problem I have with that statement is that the Supreme Court throughout history has had the responsibility to declare that certain widely accepted practices violate the Constitution—for example, deciding that segregated schools were unconstitutional, and that legislative districts had to be apportioned fairly.

Are you saying that as a Supreme Court Justice, you would oppose decisions which prohibited widely accepted practice? Stated another way, does that mean if a Gallup poll says 80 percent of the people have a particular point of view, and a court decision to the contrary, in your opinion, are those decisions quite simply wrong?

Judge SCALIA. Can I talk about what I meant when I wrote that article, instead of putting it in the context of what I would do?

Senator METZENBAUM. I am not asking what you would do.

Judge SCALIA. Right. The point I was trying to make, Senator, was simply this. There is an ongoing debate that has always been ongoing, but it is more publicly known now, about strict constructionism versus a more evolutionary theory of the Constitution. And I am speaking particularly about decisions of the court that give content to provisions of the Constitution that are not sufficiently explicit to strike down particular practices. If a practice that constitutes plainly racial discrimination existed in all the States, it would make no difference whether it existed from the beginning of the 14th amendment down to the present. If it is facially contrary to the language, obviously, there is no problem. And that is not the situation I was referring to.

I was referring to the situation where a court is giving content to in particular the due process clause of the 14th amendment, what particular substantive protections that might incorporate. And what I felt, and it was the point of that article, was that the judges have authority to give such content, no doubt, but I do not know how a judge intuits that a particular practice is contrary to our most fundamental beliefs, to the most fundamental beliefs of our society, when it is one that was in existence when the Constitutional provision in question was adopted and is still in existence.

Now, when I say a practice that is in existence, I am not referring to a Gallup poll. I am referring to the understandings of the people, reflected in the legislation that their representatives have adopted. I would find it very difficult, I was saying in that article, to strike down a provision on the basis of substantive due process in particular where it is a provision that State legislatures generally adopted at the time the 14th amendment was passed and continue to generally adopt. When you leave that point of departure, you are left to the individual preferences of the judges. And I am not comfortable with imposing my moral views on the society. I need something to look to. And what I look to is the understanding of the people.

A strict constructionist would say use only the understanding at the time of the 14th amendment. The evolutionist would say no, the understanding today as well. Whichever of those two you use—and as I said in some earlier questioning, I am a little wishy-washy on that point—but whichever of the two you use, it seems to me that either one or the other has to reflect the new right that you have found. If it was neither these when the 14th amendment was adopted nor is there today, then it seems to me, I was saying in that article, I am making it up.

Senator **Metzenbaum**. Well, it seems that you are saying that the Constitution means what the majority says it means. I have difficulty with this whole majority approach. And your language is clear: "If it contradicts a long and continuing understanding of the society, as many of the Supreme Court's recent constitutional decisions referred to earlier in fact do, it is quite simply wrong." That is a very bold statement. Maybe "bold" is even a mild word.

Judge **Scalia**. Well, maybe I should not take it on frontally, but let me do it. I would even—it is true in a way, it seems to me, that a constitution has to have ultimately majoritarian underpinnings. To be sure a constitution is a document that protects against future democratic excesses. But when it is adopted, it is adopted by democratic process. That is what legitimates it.

And the point I was making in that article is if the majority that adopted it did not believe this unspecified right, which is not reflected clearly in the language, if their laws at the time do not reflect that that right existed, nor do the laws at the present date reflect that the society believes that right exists, I worry about my deciding that it exists. I worry that I am not reflecting the most fundamental, deeply felt beliefs of our society, which is what a constitution means, but rather, I am reflecting the most deeply felt beliefs of Scalia, which is not what I want to impose on the society.

Senator METZENBAUM. Judge, the real problem I have with your article and your statements today relates to the fact—and I am sure you remember it—that when the Kefauver Committee was active, I was not here in this body, but I remember there was a great hue and cry to repeal the fifth amendment. Everybody taking the fifth was per se practically a bad person, we ought to repeal the amendment, and that will solve it so they cannot take the fifth. And then I have a recollection of somebody's poll—and I do not know whose, whether it was Gallup or somebody else—checking with people as to their views on each of the separate constitutional amendments to the Bill of Rights.

Overwhelmingly, the American people indicated they do not support that concept. Now I sit here concerned, is this new Justice of the Supreme Court going to start to find ways to change that Bill of Rights? Because it is one of the toughest things to do, and that is to stand up for an unpopular point of view on the basis that that is a person's constitutional right.

I guess I remember one case, the case in Illinois where the Nazis were picketing or they were marching, and the Jewish community came out, en masse, to try to stop them from doing it.

And I remember the American Civil Liberties Union got into great trouble because——

Judge SCALIA. Skokie, as I recall.

Senator METZENBAUM. Pardon?

Judge SCALIA. Skokie.

Senator METZENBAUM. Skokie. That is right. And in that case, the American Civil Liberties Union lost a lot of its members, but they stood up for what they thought were their constitutional rights, even though it would be unpopular.

I am worried about your going on the Court and reacting—a 15-minute rollcall vote. I guess they inform the Republican Senators as well as Democrats. I think I may have cut you off. Had you finished?

Judge SCALIA. You just made a statement, but I do not disagree with your concern. All I can say to it is that the views I expressed certainly do not reflect the notion that I will be swayed by Gallup polls, or by current public opinion. "To the contrary, if, there is an established constitutional right that has been set forth in the Constitution, or, even if not set forth very explicitly, is clearly established by the practices of the society, I would assuredly not allow the mere fact that the current society, inflamed by one passion, prejudice, or another, wants to stomp it out. I would not allow that to affect my judgment; quite to the contrary.

Senator METZENBAUM. Let me ask you a little bit——

Judge SCALIA. I do not mind taking unpopular positions, Senator.

Senator METZENBAUM. Let me ask you a personal matter, about your membership in the Cosmos Club. I think you were a member?

Judge SCALIA. Yes, sir.

Senator METZENBAUM. You were a member from 1971 to December 1985. I think the Cosmos Club excludes women from its membership, and I think the ABA's position is that the membership of a judge in an organization that practices discrimination gives rise to perceptions by minorities, women, and others, that a judge is not impartial toward minority groups. And the ABA Standing Committee on Ethics and Professional Responsibilities has been considering the impact on the judiciary, of judges who belong to discriminatory clubs. And the Judicial Conference, in 1981, adopted a resolution, that it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination.

And then in 1983, the ABA Ethics Committee submitted to the house of delegates proposed amendments on the membership of judges in private discriminatory clubs.

More than half the population is female, and the women of the country have some concern, and rightful concern, about a jurist who undoubtedly knew about some of these provisions of the ABA but, nevertheless was a member of this club.

Do you want to comment on that?

Judge SCALIA. Well, I certainly agree, Senator, that a judge should not be a member of a club that practices invidious discrimination. I think the issue is whether that was invidious discrimination or not.

I certainly would not belong to a club that practiced racial discrimination, which I do not think there is any basis for socialization on the basis of race. That there is any difference in company on the basis of the color of a person's skin or ethnic background.

Senator METZENBAUM. Did you know the Cosmos Club discriminated against women, or did not have any women members?

Judge SCALIA. I knew that it was a men's club, and what I was going to go on to say is that I do not consider that an invidious discrimination. I think there are a lot of other people who likewise do not consider it invidious discrimination. I realize there are those that disagree, that do not like organizations like the Knights of Columbus, or for that matter, the Boy Scouts, and think that that should not be an all-male organization.

I happen not to have felt that way and thus was a member of the Cosmos Club. When I first joined it, Senator, was when I first came up to Washington to work in the executive branch. I lived in the club for about 6 months while my family was still in Charlottesville.

One of the facilities of living there was that it was a men's club. Now I understand there are people who feel differently about it. I am sensitive to their views toward the end of the period that I was a membership of the club—that I was a member in the club.

I was especially uncomfortable because I know that some of the judges on my court took the opposite view of whether there should be clubs of that sort.

I happen to disagree. I am no longer a member. That is all I can say.

Senator METZENBAUM. I note you used a rather interesting story to illustrate one of your objections of affirmative action, and that is the story of Tonto and the Lone Ranger. In it I think you tell the story in Indian dialect and English. I will not read the whole story, but it is a cute story, but the English dialect of the Indian, I am not quite so sure about. Everyone who knows you says that you are quite adept with the English language; in fact, that you have exceptional verbal talent.

What do you think the Indians of this country might feel about your reciting that story with some of the quotes?

Judge **Scalia**. Would you read the quote where I use the——

Senator **Metzenbaum**. Yes. John Minor Wisdom speaks of restorative justice. "I am reminded of the story about Lone Ranger and his faithful Indian companion, Tonto. If you recall the famous radio serial, you know that Tonto never said much, but what he did say was, disguised beneath a Hollywood Indian dialect, wisdom of an absolutely Solomonic caliber. On one occasion, it seems that the Lone Ranger was galloping along with Tonto, heading eastward, when they saw coming toward them a large band of Mohawk Indians in full war dress."

"The Lone Ranger reins in his horse, turns to Tonto, and asks Tonto, 'What should we do?' Tonto says, 'Ugh, ride 'em west.' "

"So when they reel around and gallop off to the west, suddenly they encounter a large band of Sioux heading straight toward them. The Lone Ranger asks Tonto, 'What shall we do?' " Tonto says, 'Ugh, ride 'em north.' "

"So they turn around and ride north, and sure enough, there is a whole tribe of Iroquois heading straight toward them. The Lone Ranger says, 'Tonto, what shall we do?' and Tonto says, 'Ugh, ride 'em south,' which they do until they see a war party of Apaches coming right for them."

"The Lone Ranger asks Tonto, 'What shall we do?' Tonto says, 'Ugh. What do you mean we, white man?' "

It is a rather cute story but I wonder if your use of an Indian dialect would offend the Indians.

Judge **Scalia**. I am fully aware of that sensitivity, Senator, which was why, when I began the story, I made it clear that Tonto's wisdom was always Solomonic, but it was disguised between what I referred to there as a "Hollywood Indian dialect."

That is a disparaging term. I am fully aware that Indians do not talk that way. It is how Hollywood portrayed them. I thought I made it very clear in what I wrote, that Indians do not talk that way, but that is the way Hollywood wrongfully portrays them.

Now if that is not enough of a disclaimer and the story has to be stricken from everyone's repertoire, I think that would be a great loss.

And it does not work in non-Hollywood Indian. It really does not.

The **Chairman**. Senator, you have one more minute.

Senator **Metzenbaum**. There is now a pending request for certain memorandums that we have worked out in connection with Justice Rehnquist. He waived any objection to our having that information. Do you have any objection to our obtaining information from the Justice Department concerning your efforts while you were there?

Judge **Scalia**. Personally, Senator, you know, I have no personal objection to it. There was nothing I did at the Justice Department that was other than honorable. I would be less than honest if I did not say, that having worked in the Office of Legal Counsel, and defended its prerogatives for 3½ years or so, I am concerned about the institution, about the effect that such a probing, or more specifically, the awareness of the fact that whatever the head of the Office of Legal Counsel writes will henceforth, should he ever be subjected to questioning in connection with a confirmation—which is very likely because most heads of the Office of Legal Counsel, or many of them, at least, go on to later Government positions.

I think it would be harmful to the Office, if it is known that everything he puts down on paper by way of advice to the Attorney General, or to the agencies, will be made public.

I fear that it may make his advice less frank, less forthright than it otherwise would be. That is purely an institutional objection. It is up to the President to defend that institution. Personally, I have—I am not ashamed of anything I did while I was there.

Senator METZENBAUM. And you have no personal objection?

Judge SCALIA. I have no personal objection, sir.

Senator METZENBAUM. I have no further questions.

The CHAIRMAN. We will take a recess. The first, after the recess, will be the distinguished Senator from Illinois.

Senator SIMON. I thank you, Mr. Chairman.

[Recess.]

Senator SIMON [presiding]. I think we can resume.

When you are least in seniority, there are some plusses. You get to hear all the questions, and you get to have some feel for what the nominee stands for.

Let me throw you a softball question. You will be one of the leaders of the law in this Nation. You have been a law professor at Stanford, and the University of Chicago and University of Virginia, I believe.

In 1970, we had 270,000 lawyers in this country. We now have 640,000, graduating about 39,000 a year. There are those who believe the numbers are so high that it can present problems for our society.

Do you have any reflections on this? And if so this is a problem, what do we do about it?

Judge SCALIA. I share the perception that there is a problem, Senator. I am not entirely sure what to do about it. To some extent the problem feeds on itself, of course. The story of the fellow sitting in a train, and the gentleman next to him asks him what he does, and he says, "I'm a lawyer," and the fellow says, "Gee, what do you know. We used to have a lawyer in my home town. Poor devil, he could hardly make a living. Then another lawyer moved in, and now they're both doing fine."

To some extent, the very increase in the number of lawyers creates yet greater litigiousness. I do not know whether it is—it does seem to be a trend that is beginning to slow down a little bit.

The answers that are being sought are alternative dispute resolution mechanisms, other than the courts, and my understanding is that there is some success with those mechanisms.

Unfortunately, the resort to those mechanisms is in itself something of an admission of failure. People want to resort to them because the courts are too crowded, it takes too long to get justice there, and it is too expensive, which is a sad commentary.

I am afraid I just do not have an answer. I share your perception of the problem.

Senator SIMON. All right. It was not a question you expected to be asked during this hearing, I have an idea.

Judge SCALIA. No. I did not.

Senator SIMON. Let me read from a staff memorandum, along with your opinion. It draws this conclusion; "From these and the other cases included in this book, it is easy to see where Scalia's sympathies lie. He will interpret civil rights statutes narrowly. In cases of race discrimination, the plaintiff will have a very difficult time proving his case because of the high standards Scalia imposes on race cases. The same will be true with gender discrimination. To be sure, the Court will have an ardent enemy of affirmative action in Scalia, and in future cases, he can be expected to leave his mark."

"In his article—quoting from an article in Washington University Law Quarterly—you say: 'Justice Powell's opinion on affirmative action, which we must work with as the law of the land, strikes me as an excellent compromise between two committees of the American Bar Association on some insignificant legislative proposal; but it is thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution.' "

Do you have any comments on my staff's conclusion in looking at that area of your decisions, and any reflections on your Washington University article?

Judge SCALIA. Well, we discussed that article a little earlier, and as I said there, it was addressing mainly the policy of affirmative action, not its constitutionality. Whether it was desirable I—that is of course a disagreement concerning the means to the end. I do not think—I hope there is no doubt about my commitment to—or there should be no doubt about my commitment to a society without discrimination. I am—if the notion there is that I am hostile to the laws that seek to eliminate that, that is simply not true.

I am, in a way, having any animosity toward racial minorities, in my case would be a form of self-hate. I am a member of a racial minority myself, suffered, I expect, some minor discrimination in my years; nothing compared to what other racial groups have suffered. But it does not take a whole lot to make you know that it is bad stuff.

My wife's mother remembers the days—she is a Fitzgerald from Boston. I wish Senator Kennedy were here to know that. But she remembers the days when there were signs in Boston that said: "No Irish need apply." I find all of that terribly offensive.

I am a product of the melting pot in New York, grew up with people of all religious and ethnic backgrounds. When I lived in your State, Senator, I did not live in a monochrome suburb, but I lived in Hyde Park, and my kids went to school, a school that was at least 40 percent, maybe more than that, black; not white. My kids socialized with and dated people of all races.

I have absolutely no racial prejudices, and I think I am probably at least as antagonistic as the average American, and probably much more so toward racial discrimination. Beyond that, I can just say that I disagreed with affirmative action, in that article, as the way to eliminate it. The side effects that I saw, that could be worse than what the particular affirmative action program would eliminate.

In any case, those policy views will not inform my decisions from the Supreme Court, as I do not think they have informed my opinions on the court of appeals.

I think that it would be a different matter if those opinions showed any racial hostility, or hostility toward the laws, and I do not think they do.

Senator SIMON. Let me phrase the question a little differently. Let's use an imaginary scene at the White House, which might have taken place.

The President asks the Attorney General, "Get me the six best names you can get in the Nation," and he comes up with six names. One was named Jones, one Smith, and he looks through, and one is named Scalia.

And the President says, "It would be a good thing to have an Italian American on the Supreme Court."

Is there anything fundamentally wrong with the President making a decision on that basis, in part, assuming a field of equally qualified candidates?

Judge SCALIA. Fundamentally, fundamentally wrong in—you mean on legal—or morally wrong?

Senator SIMON. From the viewpoint of the theory of government?

Judge SCALIA. No; I think that it is a good thing. Certainly, in my own hiring practices, I have tried to have a mix of people among my law clerks, and elsewhere. No, I cannot say that that is——

Senator SIMON. OK. When Congress sees a plant where there are 2,000 whites and no blacks, we say as you award contracts in the defense area, let's try and encourage employers to follow practices which promote opportunities for all people.

We are not saying you should hire people who are not qualified, but that our society should provide opportunities for everyone.

In the abstract, do you find that type of legislation offensive from a legal point of view?

Judge SCALIA. That article actually came from a speech that I gave which became an article in the Washington University Law Review. I had policy views; I have tried not to have them—not have any public ones anyway, since I have been a judge.

So I would like not to comment on it as a policy matter. I just want to note that there is a difference between the first hypothetical you gave me and that. And the difference is this. It is the President saying, you know, it seems to me to be good to hire a Puerto Rican or whatever as his own voluntary decision; and, on the other hand, saying the President or anybody must hire an Italian or a Puerto Rican or a certain percentage of them. The difference is that when you adopt the latter situation, you are automatically excluding some people from consideration.

Now, that makes a difference just as a policy matter. So it's a slightly different question.

I guess that what my Washington University piece would say is that in the days when I had policy views I didn't think it was a good idea. That has nothing to do with whether I would enforce it vigorously if it's passed by Congress.

Senator SIMON. I guess my experience has been and maybe yours, too, that if you have policy views inevitably they creep up or creep out or appear when you are on the Supreme Court, or in any other position.

But I guess what you are telling me is that this is a policy matter for Congress to decide and that you do not see a constitutional prohibition to Congress moving ahead.

Judge Scalia. Well, I guess we can get into the question of whether the latter is a pillar or not, but I would like not to express a view on the constitutionality of the matter. But certainly the policy of the matter is entirely Congress'. I am certainly in sympathy with the objective of Congress. Whether I am in sympathy with the particular means Congress has pursued to that objective, I assure you will have nothing to do with my decision.

I understand that it's hard, but it's a discipline that a good judge has, and I think it's one that I have.

Senator Simon. Let me shift to another line of questioning. After looking at your decisions in the first amendment area, my staff draws this conclusion: "In all three of the important libel cases that have come before him, Judge Scalia has ruled against the press."

I received a memo from my colleague, Senator Dodd of Connecticut, expressing some concerns in this area as well. You have in part answered this question of one of my colleagues—but are there any general comments you would like to make in response to this characterization of your stands?

Judge Scalia. I'd be happy to talk about the three cases, if you'd like. What three was he referring to?

Senator Simon. One was the Mobil Tavoulareas, if I am prononcing it correctly.

Judge Scalia. Well, that is the one case, one of very few cases, I can't talk about because it's still before our court on petition for rehearing, but I can at least note that it was not my opinion. It was the opinion of Judge McKinnon in which I joined.

Now, the holding of the case was on a factual matter. I think I had better not try to defend the holding at all, except to note that the opinion was not mine, it was an opinion in which I joined.

Senator Simon. But you believe that characterization of your decision is not an accurate characterization.

Judge Scalia. I think sometimes you win, sometimes you lose. The fact that I joined an opinion against the press doesn't prove anything.

What are the other opinions, Senator? I think I can probably guess.

Senator Simon. The other one that is quoted here quite a bit is *Ollman* v.——

Judge Scalia. *Evans and Novak* v. *Ollman*. Senator Hatch said a few words about that case earlier. It really, as I think he pointed out, is a sort of damned-if-you-do-damned-if-you-don't situation. I could have been criticized as being against Marxists had I come out the other way. It was a suit by a Marxist against a conservative columnist.

The fact is that my dissent in that case—it's a dissent that they are referring to—was joined in by, if I recollect correctly, Chief Judge Robinson. The position that I took was joined in by Judge Robinson, Judge Wright, Judge Edwards, and Judge Wald. My opinion itself was joined in by Judge Edwards and Judge Wald.

I don't think that that is any indication of a bias against the first amendment, unless all of those judges are deemed to have the same bias, which I would doubt.

The specific issue in the case was whether a particular—it was a very narrow issue. We were all in agreement on the basic principles of first amendment law, that it was libelous if it was not an opinion; it was not libelous if it was an opinion.

And the issue before the court was whether the statement that this Marxist professor, who was up for appointment as the chairman of the department of political science at the University of Maryland—the statement that he had no status in his profession, was not taken seriously by his colleagues, something to that effect, whether that was libel. I thought that that was not a statement of opinion but a statement of fact, that he was not highly regarded by his colleagues. And, in fact, in traditional libel law, the classic libel is to say that you are not regarded as competent by your professional associates.

I just don't believe there is anything in there that is antagonistic to the first amendment. I think the opinion that I wrote, which largely responded to Judge Bork's concurrence, had a statement which was quoted bv a columnist to the effect that public figures getting a good amount of bumping from the press was fulsomely assured by *New York Times* v. *Sullivan*. It somehow came out in the press as though I was saying that the freedom of the press was fulsomely assured by *New York Times* v. *Sullivan*. I wasn't saying that at all. I was saying that the fact that public figures will get a good amount of bumping was fulsomely assured, by which I mean assured not only sufficiently but more than sufficiently.

I don't think there is anything in that statement that demonstrates an antagonism toward the first amendment.

And the last case, Senator, was what? I would welcome any opportunity to——

Senator SIMON. I think you've adequately covered it here.

Let me shift to another area. You testified in 1981 on the tuition tax credit case, and you said—Senator Moynihan was taking your testimony: "The Court's decisions in this field set forth neither a settled nor a consistent nor even a rational line of authority that you could rely on, even if you wanted to."

You were not aware that you were going to be a nominee for the Supreme Court when you said that.

Do you have any general reflections on the whole church-state issue?

Judge SCALIA. I suppose it doesn't give any indication how I'm going to vote on any particular case to say that I don't think that statement would be much altered today, and I doubt whether there are very many people who would disagree with it, with the possible exception of—well, even the "rational"—the decisions are very difficult to reconcile with one another, the decisions that are on the books.

The rationale that is adopted in one case does not fit entirely well with the cases that have been cited in the past. I think that's common ground among the people who discuss the establishment clause cases. Whether the cases are thought of as being right or wrong, I think there is general agreement that it is one of the messiest areas of constitutional jurisprudence.

Senator SIMON. Well, assuming that, are basic traditions pretty sound in the whole church-state area?

Judge SCALIA. Basic traditions?

Senator SIMON. Yes.

Judge SCALIA. I'm not sure what you mean by "basic traditions," Senator.

Senator SIMON. Interpretation of the constitutional principles in this area as they have emerged over the past two centuries.

Judge SCALIA. Well, I think what's sound is that—what's accepted—the problem in the area, Senator, is a problem that largely arises because of a natural conflict between the establishment clause and the freedom-of-religion clause. Both of those interests are very important. People ought to be able to practice their religion freely, and yet the Government cannot establish religion.

So you get cases like the case of the Jehovah's witness, who, being a sabbatarian, wants to have Saturday off instead of Sunday, and wants to draw unemployment compensation when she's been offered a job that requires work on Saturday and turned it down.

And the way the Court resolved the case was to say it violated the freedom-of-religion clause for a State not to allow her to draw unemployment compensation simply because she refused to accept a job that would require her to work on Saturday.

Well, yes, that does protect freedom of religion, but, on the other hand, doesn't that somehow amount to an establishment of religion to have the State make a special rule to accommodate the religious belief of this sabbatarian?

That's the problem that runs throughout these cases, and that's the reason they are very hard to figure. On some occasions the Court seems to be giving more weight to the freedom-of-religion section of the first amendment, on other occasions it seems to be giving more weight to the establishment clause section.

If I had to pick an area in the whole area of constitutional law that is in an unsettled state, I think that that's the one. I think many commentators would agree.

Senator SIMON. I see my time is up, Mr. Chairman. Thank you.

Senator DENTON [presiding]. The Senator from Illinois is correct, and the second round will involve, according to previous announcement of Senator Thurmond, 10 minutes each, and the Senator from Delaware is next.

Senator BIDEN. I'm sorry, I thought we were going to yield to my colleague. I appreciate that, and I will yield to my colleague from Alabama. Then maybe I could ask my questions.

Senator DENTON. The senior Senator from Alabama.

Senator HEFLIN. You've been previously asked about the intercircuit tribunal. However, the question is phrased as to whether or not the appointing power ought to be the Chief Justice or the President.

Under the proposed legislation, a temporary court of existing officers of the United States, who have already been confirmed under the Constitution—the selection of those judges has been debated. There seem to be two alternatives, one being the—well, there would be three alternatives, one being the Chief Justice appointing them, another being the circuit themselves selecting their judge, and the third being the Supreme Court instead of the Chief Justice—all nine members of the Supreme Court doing the selecting.

Do you have any opinion on which you consider the better method of those three?

Judge **Scalia**. It sounds like the least of the evils offered, Senator, doesn't it? There are problems with all of them.

It's very hard to envision a court getting together for such a purpose, to select one of its number to be the designee or for the Supreme Court to select particular individual judges. It amounts to the kind of designation of ability and primacy that I would—I certainly wouldn't want to do it as a member of a court of appeals, I wouldn't particularly want to do it as a member of the Supreme Court either.

Your judgment on that is as good as mine, Senator. I guess that having the Chief Justice do it is the least evil—but there are problems with that, too. It doesn't give you the spectrum of opinion that having a body of people do it would.

Some questions don't have any good answers, Senator.

Senator **Heflin**. Well, sometimes you can't get people to state a position

But let me ask you on another matter. We've got an issue before Congress now on the impeachment of a Federal judge. The House of Representatives has brought articles of impeachment which are an indictment. The Senate is supposed to sit as a trial judge. For the judiciary this appears to be a rather cumbersome process. Some of the States have had other procedures for removal of judges—and I'm not trying to prejudge or do anything pertaining to the one before us—I just wondered if you have any thoughts on any innovations or improvements pertaining to problems that could arise with judges on the Federal branch.

Judge **Scalia**. Well, giving this answer now that I'm a judge does make it sound as though it's self-pleading, but I had the same view before I became a judge. It is a cumbersome process—I think it should be a cumbersome process. I think it's the major protection for the independence of the judiciary. The bases of impeachment are somewhat vague, and the bases that past Congresses have sought to use in the most prominent cases are pretty vague.

It seems to me that it is an important protection to the independence of a judge to be able to decide cases as he sees them, that removing him is a lot of trouble.

Senator **Heflin**. Well, some of the States have had various methods; some have had the equivalent of House action taken or a judiciary inquiry commission, and then have a court of the judiciary, which is largely composed of judges, and may also be some lawyers. Others have had commissions which deal with the disciplinary and removal matter.

You don't have any feeling about those, or you think impeachment is more of a protection of independence than those methods?

Judge **Scalia**. I think much more so. It's not as though the framers didn't know that they were establishing something that was very cumbersome and very difficult. They were out of step with many of the Colonies at the time in what they provided for the judiciary.

One of the major debates at the Convention was the provision on the judiciary, giving them life tenure, for example.

Our Federal judiciary is out of step with the States in many other respects. Many States have mandatory retirement ages, as you know; many States still, I believe, have election of judges. And all of those things were considered and rejected in favor of an extraordinarily strong—extraordinarily, more so than most of the Colonies then and more so than most of the States now—an extraordinarily strong and independent Federal judiciary. I think it was a conscious decision by the framers, and I happen to think that it was a good one.

But I understand, especially at a time when the Congress has plenty else to do, to have to sit in a trial of a judge is cumbersome.

Senator HEFLIN. I believe that's all the questions I have at this time, Mr. Chairman.

Senator DENTON. The Senator from Delaware.

Senator BIDEN. Thank you. You've had a long day, Mr. Justice, but from the time I've been here it seems like you've had a pretty good day. And let me at least close out my questioning by asking for a couple of clarifications, and also to go a little bit into privacy questions, the ninth amendment. I understand that, in response to a question from Senator Metzenbaum, you indicated that you would not belong to a club that discriminated based on race, but you would not feel bound not to belong to a club that discriminated based on sex, is that correct?

Judge SCALIA. That isn't quite what I said, Senator. I said that I regarded the two as quite different, and I would think that a club that discriminates on the basis of race or on the basis of religion, that would be invidious discrimination. I think the jury's out on whether it's invidious discrimination to have a men's club. That's what I said.

Senator BIDEN. I didn't hear the last part.

Judge SCALIA. I think that there is room for disagreement on whether a social club that is a men's club or a women's club is invidious to the other sex.

Senator BIDEN. Could it be invidious if in fact the effect of keeping women out was to have a detrimental impact upon their ability to do business, if they were businesswomen, or participate in sport, if they were sportswomen?

Judge SCALIA. I can see that, Senator, yes.

Senator BIDEN. In what context would you place those clubs which would discriminate based upon nationality?

Judge SCALIA. Well, you know, there is sort of affirmative and negative discrimination, I suppose. I have been a member of Italian-American clubs, members who share a common heritage. The exclusion of others is not an invidious exclusion at all. And likewise religious clubs, Knights of Columbus and whatnot; they exclude people of other religions, not invidiously, but just because they get together to celebrate what they have in common.

I think that's the key to it, whether the exclusion is an invidious one or not.

Senator BIDEN. If in fact there was a club or organization that included not one group, but a group of people who shared nothing in common other than the fact they didn't like the Irish or the Italians——

Judge SCALIA. Yes, I think that would be invidious.

Senator BIDEN. You've been questioned on this already, but in your—let me make sure I have the right title of the article—article referred to as the Panhandle magazine article you stated certain views?

Judge SCALIA. Yes, sir.

Senator BIDEN. I understand that one of my colleagues quoted you, the provision that said "I do not care how analytically consistent with analogous precedent such a holding might be, nor how socially desirable in the judge's view, if it contradicts a long and continued understanding of the society, as many of the Supreme Court recent constitutional decisions referred to earlier in fact do, it is quite simply wrong. There will be no relief from the most farreaching intrusions of the modern judiciary until the Supreme Court returns to this essentially common law approach to constitutional interpretation."

Now, as I understand it, if in fact it were a long-established societal view, it would—why don't you explain it to me.

Judge SCALIA. Let me try, Senator. I am deeply mistrustful of my ability, without any guidance other than my own intuition, to say what are the deepest and most profound beliefs of our society. And that's what it means to say that something is constitutionally required. It is in accordance with the deepest and most profound beliefs of our society.

I find it difficult to come to the conclusion that something qualifies for that description when neither at the time the constitutional provision in question was enacted, was it in fact the practice of the society, as demonstrated by the laws the society enacted, nor at the present time is it that way.

Now, I can understand—and you get into the debate between the evolutionists and the original-meaning types when you say, well, what if everybody now thinks it's awful and there are no laws on the books of this sort today, but there were in 1789, so it must be constitutional—it seems to me that's a good debate. But I find it very difficult to say that it is contrary to our most fundamental beliefs when both in 1789 and today all of the States permit the practice in question, whatever it may be.

Once you don't give me that to hang onto, Senator, I worry that I am left with nothing to tell me what are our most profound beliefs except my own little voice inside. And I do not want to govern this society on the basis of that.

Senator BIDEN. Well, let's talk about the 9th amendment in that context.

The decisions—and I don't expect you to comment on how you would rule—that have arisen that have been somewhat controversial, where the right of privacy is asserted as being a right that is protected or recognized under the 9th amendment—I guess that maybe is the place to start. If you believe that implicit in the 9th amendment is a recognition of a right called the right of privacy—not to what extent it applies, but that there is such a thing as the right to privacy.

Judge SCALIA. I think that's in effect asking me to rule on cases. I can say that the Supreme Court has held that there is such a thing as a right of privacy. But they haven't tied it to the 9th amendment. As far as I know, there is no Supreme Court holding that rests any right exclusively on the 9th amendment. They may include the 9th in a litany of amendments from which various penumbras emanate, and the 9th was among them.

Senator BIDEN. Do you believe that there is such a thing as a constitutional right to privacy, not delineating whether, for example, the right to terminate a pregnancy relates to the right to privacy or the right to engage in homosexual activities in your home is a right to privacy, or the right to use contraceptives in your home is a right—but, in a philosophic sense, is there such a thing as a constitutionally protected right to privacy?

Judge SCALIA. I don't think I could answer that, Senator, without violating the line I've tried to hold.

Senator BIDEN. I don't know how you——

Judge SCALIA. I can tell you that that is what certainly a number of Supreme Court opinions now say.

Senator BIDEN. Well——

Judge SCALIA. You know, somebody may come in and say, just as somebody might come in and say *Marbury* v. *Madison* was wrong, that it doesn't exist.

I do not want to be put in the position of having to tell, you know, I'm sorry, I believe in the right of privacy, because I told the committee, in connection with considering my nomination, that I believe in it.

Senator BIDEN. Well, the fact that you believe in the right to privacy doesn't mean that a case before you in fact rises to the level of being protected by that right. I think you are being a little bit disingenuous with me here. If in fact you conclude that there is an existing right to privacy that in no way predisposes you to have to rule one way or the other about whether or not a claimed right is encompassed by the provision.

Judge SCALIA. Senator, I beg to differ. There have been scholarly criticisms of the whole notion of right to privacy.

Senator BIDEN. Oh, I agree.

Judge SCALIA. And it's not at all inconceivable that that criticism will be reflected in a brief before the Supreme Court, and I don't——

Senator BIDEN. That may very well be, but it doesn't—in other words, if the right to privacy exists, if you believe the right to privacy exists—and I believe you have stated in—excuse me one moment.

[Senator Biden consults with staff.]

Senator BIDEN. I believe, and I can't pin down where you said it—it is in an article?

Judge SCALIA. I don't think you'll find it in——

Senator BIDEN. In the Panhandle article, didn't you say that the right to privacy is one of the deepest and most profoundly held beliefs in our society?

Judge SCALIA. I don't recall having said that, Senator.

Senator BIDEN. I'm sorry, I misspoke. What was being referred to was your answer to me earlier saying that in order to meet your test it has to be one of the deepest and most profoundly held views in society.

Do you have any doubt the right to privacy is one of those deeply and profoundly held views of American society? Forget the Constitution—let's just talk politics, you and me.

Judge **Scalia**. It's very hard to answer—you began this line of questioning by answering me never mind what the right of privacy consists of. I can't answer that question without knowing what you mean by the right of privacy.

Senator **Biden**. True, you can acknowledge whether or not you believe there is in fact—let's just start over again, clean the slate.

Do you believe that Americans as a whole believe that that they have inherent right to privacy—that they think they have a right to privacy? Do you think that is a deeply and profoundly held belief by American society, whether it's found in the Constitution or found in natural law or found in their Bible or found in the Talmud? As a society, do you have any doubt that Americans believe it?

Judge **Scalia**. No, I'll give you that, Senator.

Senator **Biden**. Good man, I tell you we're getting there—all right.

Now, having said that, is there any doubt in your mind that the 9th amendment, in conjunction with other amendments as it relates to particular assertions of particular rights of privacy—if I can find the 9th amendment here so I don't misquote it—do you have the 9th amendment sitting there? Dig it out for me, will you? Roman numerals confuse me, Judge.

Judge **Scalia**. Let's see if yours is the same as mine—I have one here, too. [Laughter.]

Senator **Biden**. I almost read the 11th. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Is there any doubt in your mind that the people, at the time and now, believe they have retained the right to privacy, whatever that means?

Judge **Scalia**. No, I think there is no doubt in my mind of that.

Senator **Biden**. Second, if in fact—well, I don't have to go any further actually, because in fact it seems to me that in some form or other there is a constitutionally protected right of privacy. What that means remains to be seen, whether it means the right to engage in homosexual activity in one's bedroom or anything else remains—I'm not going to ask you to comment on that.

But let me—I guess my time is—I know my time is up—but let me pursue this one step further, if I may.

When I look at your musings—and I don't mean that in a derogatory way, because I love to read what you've written, I love the way you go about it, I wish I had had you in class. I'm probably too old to have had you in class, but you're the kind of guy that I would have liked to have had in class. I could have gotten by with you because we could have talked about philosophy and as long as you didn't ask me what the case stood for, I'd be all right.

But when I tie your musings on original meaning and original intent, where I must admit I put you more in the school of the original-intent fellows than I do in the living Constitution area, I begin to be concerned. And then when I take your second stated principle in the Panhandle article, which is basically that if it is a long-held societal view that has been in effect recognized through constitutional interpretation, case law, Supreme Court cases, then you would be very reluctant to overturn it.

Do I read that correctly, or am I putting words in your mouth?

Judge SCALIA. No. Yes, I think that's a fair statement.

Senator BIDEN. Now, the irony of all ironies is that the people who are concerned about you, some who are concerned about you, women's groups—prochoice women's groups who are concerned about you—they worry you will use that rationale to overturn *Roe* v. *Wade*

Ironically, it seems to me, you could read your view as saying that if that hangs in the law another 10 or 15 years, it would be awful hard—you would by your own test have trouble overruling *Roe* v. *Wade.*

So I guess what I am asking, without asking about *Roe* v. *Wade,* is whether there is a time frame? If it's on the books, if it is settled constitutional law for an extended period of time, and the argument to overturn that settled constitutional principle does not in fact meet the test of on its face being consistent with what the correct constitutional principle is, do you have to stick with what the settled law is?

You know, I know how that sounds—but you are making it understandably hard for me, because you can't talk about specific cases.

Judge SCALIA. I agree with the statement that longstanding cases are more difficult to overrule than recent cases.

Senator BIDEN. What do you have to find, as a matter of constitutional principle, to overrule longstanding cases? And I am not talking about any one case now. Constitutional principle enshrined, it's been there, reaffirmed by cases for 20 or 25 years—what do you have to find as a logic to overturn it?

Judge SCALIA. Well, in every case, Senator, you have to find that it's simply wrong, that it's not a correct interpretation of the Constitution.

Senator BIDEN. OK, that's what we are getting at.

Judge SCALIA. You begin with that. But, as I've said, some cases that are so old, even if you waved in my face a document proving that they were wrong when decided in 1803, I think you'd have to say, sorry, too late.

Senator BIDEN. How about 1969?

Judge SCALIA. Well, that's not 1803. All I can say is——

Senator BIDEN. I am really trying to get a sense of time.

Judge SCALIA. I don't want to mislead you into thinking it's just a function of time.

Senator BIDEN. No, I don't want to read it as just a function of time. As I understand it, if in fact enough time has passed, and notwithstanding the fact that you could argue that it was wrongly decided at the time because it was an overgenerous interpretation of a recognized right, it becomes settled practice, and the argument to overturn it is not that it was an incorrect decision 25 years ago because it was too expansive, but the argument required to overturn it is that clearly on its face they disregarded the clear intention of the Constitution? Case in point: *Plessy* v. *Ferguson.*

Senator MATHIAS [presiding]. May I interrupt the Senator from Delaware. He asks the question: "When is the wine aged?"

Senator BIDEN. Well, I understand——

Senator MATHIAS. I would say the wine's time has come.

Senator BIDEN. I understand that, but I appreciate his biting humor—but I thought this was a serious line of questioning, but I will cease and let my——

Senator MATHIAS. Well, it's not a question of cutting you off. The Senator from Illinois has been waiting.

Senator BIDEN. The Senator from Illinois just asked questions, he can ask them again—I have no further questions. Thank you very much.

Senator SIMON. I thank you. Mr. Chairman, if I am being recognized.

After the most recent dialog, you may wish to decline to answer this next question on your constitutional right of privacy, Judge. May I ask why you resigned from the Cosmos Club?

Judge SCALIA. The basic reason I resigned, Senator—I think I described earlier how I had first become a member, I used the club a lot, I lived there for 6 months, I used it a lot when I was in Chicago because when I came up to Washington to testify or to do any other business, which I often did, since ad law was my field, I would stay there.

I came to use it very infrequently when I was a member of the court that I now sit on, which is at the other side of town. So I found I was having lunch there maybe twice a year, and I quickly calculated that it was costing me something like $250 a lunch. It didn't seem to me to be worth the trouble.

Senator SIMON. That's a pretty expensive lunch.

Judge SCALIA. It is an expensive lunch.

Senator SIMON. But did you leave the club in part because you felt uncomfortable with the regulations of the club?

Judge SCALIA. I would hesitate to say that, Senator. I don't know whether that alone would have done it. I told you that I was uncomfortable at doing something, which, although I thought it was perfectly OK, was offensive to friends whose feelings I am concerned about.

But I can't say that that alone was the reason.

Senator SIMON. One other question, and I will be very brief. You made a speech on legislative intent in which you said: "if I were writing on a blank slate, I suppose I could call into question the fundamental premise upon which all use of legislative history is based."

And then a little later on in the same speech you say, "As an intermediate Federal judge, I can hardly ignore legislative history when I know it will be used by the Supreme Court."

Now, you will become part of the Supreme Court. Do you still believe, if you were writing on a blank slate, you would call all of legislative history into question?

Judge SCALIA. Yes. If I could create the world anew, I suppose I still would, but I will no more be able to create the world anew when I am sitting on the Supreme Court than I could when I was sitting on the court of appeals, if I ever get to sit up there.

And if the burden of your question is whether I would utterly ignore legislative history on the Supreme Court, the answer is no, I would not.

Senator SIMON. I have no further questions, Mr. Chairman.

Senator MATHIAS. Senator Heflin.

Senator HEFLIN. I only have one or two questions

Judge Scalia, I noticed you smoke a pipe. It may well be that someday you may have to rule in the right of privacy as to whether or not an individual can smoke a pipe in his study or in his bedroom, so I hope you take care of us smokers one of these days.

I have no further questions

Senator MATHIAS. I have just one or two questions, Judge.

You have already testified concerning your approach to legislative history. In your judgment, what weight ought to be given to a committee report in identifying the intent of Congress in enacting the legislation which a report accompanies?

I think Senator Grassley asked you about a rather unusual situation——

Judge SCALIA. Yes, right.

Senator MATHIAS. Let's leave that aside, and just look at it as a general matter.

Judge SCALIA. Senator, as a general matter, I am not as enamored of committee reports as authoritative expositors as some judges are. I may say, by the way, that my view on that matter is not idiosyncratic.

There are—my impression is that a number of judges have come to feel that the process has gotten out of whack; that, to some extent, because the courts have used committee reports to such degree, the committee reports are no longer as accurate a device as they used to be.

It is sort of the phenomenon of when the cameras go—it is sort of the phenomenon of your never being able to look at yourself in the mirror and see what you really look like because you know you are looking at yourself, and it is the same thing with committee reports.

Once it was clear that the courts were going to use them all the time, they certainly became a device not to inform the rest of the body as to what the intent of the bill was, but rather they became avowedly a device to make some legislative history and tell the courts how to hold this way or that way.

Once that happens, they become less reliable as a real indication of what the whole body thought it was voting on. That is why I am sorry if it does not please some of the Senators, but I just have to say that I am more suspicious of them than some judges may be.

Senator MATHIAS. I raise the matter not merely because of how it reflects on your views as a judge. It also could be helpful to us in our committee practices. It is a matter of more than ordinary interest.

A case decided by the Supreme Court this term, the *Gingles* case, *Thornburg* v. *Gingles,* turned in part on whether the report of this committee or some remarks on the floor better expressed the intent of Congress on the Voting Rights Amendments of 1982.

Several members of the committee filed an amicus brief on the issue. Ultimately, the court agreed with us, stating that "we have repeatedly recognized that the authoritative source for legislative intent lies in the committee reports on the bill."

Now, I gather that you would feel there might be some circumstances in which that much recognition should not be controlling.

Judge SCALIA. I doubt very much, Senator, whether I would not use committee reports at all when I am on the Supreme Court, but I do think that the view I am expressing of greater skepticism than has been brought to bear upon them in the past is, unless I mistake my guess, the wave of the future.

I think the courts sometimes are beginning to feel that they are being——

Senator MATHIAS. I hope the committee will listen to what you are saying, because I take that as a constructive criticism. We should make every effort to do better on committee reports and make them more helpful.

Judge SCALIA. It is not the quality of the report or the work that has gone into them, both of which are fine. The essential ingredient, however, is for the court to know that when the Senate voted on the bill, that is what the full Senate meant.

And if there is some way that the actual attention of the whole body to that particular item, which very often is such a subsidiary item that one really has to wonder whether the notion that the full Senate had in mind this one statement in a multipage report—whether that is not utterly fictional, and if it is fictional, then it does not really represent the intent of the Senate when they voted. That is the problem.

Senator MATHIAS. I would have to agree with you. It is a fairly rare event where the committee itself has any argument over the language of the report, and occasionally it happens where a line is written in or a line is stricken out, but that is, I think, the exception rather than the rule.

The subject of judicial activism is one that is important to the chairman. You published an article last year in which you noted the tendency to regard the courts as an alternate legislature whose charge differs from that of the ordinary legislature in the respect that while the latter may enact into law good ideas, the former may enact into law only unquestionably good ideas, which, since they are so unquestionably good, must be part of the Constitution.

You went on to say that "every era raises its own particular threat to constitutional democracy and the attitude of mind, thus caricatured, represents the distinctive threat of our time."

I do not think anybody would disagree that unbridled judicial activism is a bad thing. Certainly, Thomas Jefferson believed that. Did you mean to say that it is the distinctive threat of our time?

Judge SCALIA. Oh, you are right; that may have been too broad a statement. In the context in which I was speaking, it is the distinctive threat with relationship to the judicial process of our time, I think, if there is one failing, and perhaps in our entire governmental process bearing upon the relationship among the three branches.

Senator MATHIAS. I would agree with the thrust of your remarks earlier today in which you said that if legislatures were more precise, there would not need to be so much judicial activism. Sometimes we invite judicial activism.

The one-man, one-vote cases, for example, came about as a result not of legislative imprecision, but rather legislative stalemate on the subject, and it represented a clear example of legislative failure which invited judicial activism. It really demanded judicial activism in a case in which it apparently was a necessary resort under the Constitution to deal with a problem of major proportion, the malapportionment of congressional districts.

I am glad you have put that characterization into context.

Judge SCALIA. I am sorry that article has gotten the most attention. It is, doubtless, the--of all my articles, it is the one I am least proud of. I am not ashamed of it, but it was a couple-of-page thing in a rather popular, as opposed to scholarly publication—probably not even very popular, but at least not scholarly.

Senator MATHIAS. Well, I have just one more question, and that is on the question of original intent, a very popular subject for articles, lectures, speeches.

What is your approach to this rather arcane subject?

Judge SCALIA. Well, it is where I start from, Senator. I think the first step is to—and I use the term "original meaning" rather than "original intent," which is maybe something of a quibble, but I think that one is bound by the meaning of the Constitution to the society to which it was promulgated.

And if somebody should discover that the secret intent of the framers was quite different from what the words seem to connote, it would not make any difference.

In any case, I start from the original meaning, and I think there is room for dispute as to to what extent some of those elements of meaning are evolvable, such as the cruel and unusual punishment clause.

The starting point, in any case, is the text of the document and what it meant to the society that adopted it. I think it is part of my whole philosophy, which is essentially a democratic philosophy that even the Constitution is, at bottom, at bottom, a democratic document.

It was adopted by the people's acceptance of it, by their voting for it, and its legitimacy depends upon democratic adoption at the time it was enacted. Now, some of its provisions may have envisioned varying application with varying circumstances. That is a subject of some dispute and a point on which I am quite wishy-washy.

But I am clear on the fact that the original meaning is the starting point and the beginning of wisdom.

Senator MATHIAS. Well, my time is up, but the chairman will indulge me just to finish that question. What happens if the starting point is zero? For instance, the whole range of public school issues are beyond any scope of the Founders' original intent because there was not a public school system at that time. Many of the public school questions that have come before the Court could not have been precisely forecast by the Founders because you are talking about a whole institution that has been invented since their deaths.

Judge SCALIA. On those types of issues, Senator, where the law has to be applied to circumstances that just did not exist at the time, you obviously have to decide as a judge what resolution would most comport with the application of that clause to the circumstances that did exist at the time and try to make it fit.

Senator MATHIAS. Thank you very much, Judge Scalia.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. I have no further questions. If the judge would not mind, I would appreciate it if we could keep the record open so if any of my colleagues have questions they want to submit in writing we could include them in the record.

The CHAIRMAN. Thank you, Senator. Without objection, we will do that. How long would you want to keep it open, Senator, until Thursday?

Senator SIMON. If we could keep it open—how about keeping it open until Friday?

The CHAIRMAN. Friday?

Senator SIMON. Friday.

The CHAIRMAN. All right. At your request, we will do that. We will keep the record open for any questions that any member of the committee wishes to propound to Judge Scalia until Friday. Friday, say, at 4 o'clock would that be satisfactory?

Senator SIMON. Fair enough.

The CHAIRMAN. Any member who desires to submit questions by 4 o'clock Friday, it will be agreeable.

Judge Scalia, I want to commend you for the way you have handled yourself in this hearing. I think you are one of the best-qualified men that has come before us to be a judge on the circuit court or Supreme Court.

Your successful law practice, professor of law in four different law schools—at least in three, and then I believe you were a visiting professor at Stanford—and I have been impressed that you possess the qualities we need in a judge, and that is in judicial temperament and the other things I mentioned this morning.

I think you will be able to assist the other judges on the Court, too, in arriving at a consensus. I have a feeling that you are not only a good musician, but you are a persuasive talker, and with your great legal knowledge, I think you will be able to help with a consensus.

You have a reputation for being a hard worker, a man of great analytical skills, sound judgment, congenial personality, and all of these qualities, I think, will be of great benefit to you on the highest Court in our land.

The American Bar Association has found you well qualified. That is the highest rating they can give you, and they will be testifying tomorrow as the first witness tomorrow.

But I just want to say to you that we are fortunate, I think, to have a man like you to be appointed to the Supreme Court, and I commend President Reagan for appointing you and I wish you well on the Bench and I am sure you will have a successful tenure.

I do not think it will be necessary now for you to come back anymore; if so, we will let you know. You are welcome to come back tomorrow. There are some other witnesses; some are for you and some are against you, if you want to be here, but it will not be necessary.

Judge **Scalia**. Thank you, Mr. Chairman. May I thank the committee for its courtesy, and I have genuinely enjoyed being here.

The **Chairman**. The distinguished Senator from Illinois, did you have any comment that you wanted to make at this time?

Senator **Simon**. I have nothing further.

The **Chairman**. The distinguished Senator from Maryland, do you have any comments?

Senator **Mathias**. Mr. Chairman, I join with you in congratulating Judge Scalia on a very fine performance before this committee. We have seen a good many judicial nominees who have come here and I do not think any of them have surpassed Judge Scalia in the manner in which he has addressed the questions and the kind of thoughtful responses that he has given to the committee.

As I suggested a minute ago, some of his comments may be helpful to us in the conduct of our own business, so we appreciate your being here.

Judge **Scalia**. Thank you, Senator.

The **Chairman**. We will begin at 10 tomorrow, and after we get through with the American Bar Association, we are going to allow 3 minutes to the other witnesses, and we want to finish this hearing tomorrow.

We now stand in recess until 10 tomorrow.

[Whereupon, at 7:58 p.m., the committee was adjourned, to reconvene at 10 a.m., Wednesday, August 6, 1986.]

NOMINATION OF JUDGE ANTONIN SCALIA

WEDNESDAY, AUGUST 6, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room SD-106, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Specter, Hatch, Heflin, Simon, Metzenbaum, Kennedy, Leahy, Grassley, DeConcini, Mathias, and Biden.

Staff present: Duke Short, chief investigator; Dennis Shedd, chief counsel and staff director; Frank Klonoski, investigator; Jack Mitchell, investigator; Melinda Koutsoumpas, chief clerk; Mark Gitenstein, minority chief counsel; Cindy Lebow, minority staff director; Reginald Govan, minority investigator; and Christopher J. Dunn, minority counsel.

The CHAIRMAN. The committee will come to order.

First is the ABA. Will the ABA representatives come around, please? Mr. Robert B. Fiske, Jr., Mr. Gene W. Lafitte, and Mr. John D. Lane.

Stand and raise your right hand and be sworn. Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. FISKE. It will.

Mr. LAFITTE. It will.

Mr. LANE. It will.

The CHAIRMAN. I have got to open the Senate in 10 minutes. Senator Hatch was to be here to take over. We will take a 10-minute recess.

[Brief recess.]

Senator SPECTER [presiding]. The hearing will come to order.

Senator Thurmond, the chairman of the committee, had to go open up the Senate and has asked me to chair in his absence. We will proceed at this time.

The current witnesses are representatives of the American Bar Association, Mr. Fiske, Mr. Lafitte, and Mr. Lane. We will proceed at this time. Mr. Fiske, if you will start.

TESTIMONY OF ROBERT B. FISKE, JR., CHAIRMAN, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY JOHN D. LANE, WASHINGTON, DC, AND GENE W. LAFITTE, NEW ORLEANS, LA

Mr. FISKE. Good morning, Senator Specter.

My name is Robert B. Fiske, Jr. I practice law in New York City, and I am chairman of the American Bar Association, Standing Committee on the Federal Judiciary.

With me today are two other members of our committee: John D. Lane of Washington, DC, and Gene W. Lafitte of New Orleans, LA.

I would like to say that during the time that the investigation of Judge Scalia went forward I was engaged in a major trial in New York. I am very grateful to Mr. Lafitte who undertook to coordinate and chair the investigation that was conducted of both Justice Rehnquist and Judge Scalia. Of course, Mr. Lafitte did present the position of the committee to the Senate Judiciary Committee last week on Justice Rehnquist.

Mr. Lane is the circuit member from the District of Columbia who conducted the principal part of the investigation on both Justice Rehnquist and Judge Scalia.

We appear today to present the views of the American Bar Association on the nomination of the Honorable Antonin Scalia of Washington, DC, to be an Associate Justice of the Supreme Court of the United States.

At the request of the Attorney General, our committee investigated the professional competence, judicial temperament, and integrity of Judge Scalia. Our work included discussions with more than 340 persons, including the Justices of the Supreme Court of the United States and many other Federal and State judges across the country; a national cross section of practicing lawyers; and a number of law school deans and faculty members, some of whom are specialists in constitutional law and scholars of the Supreme Court.

In addition, we have had Judge Scalia's opinions reviewed by a team consisting of the dean and law professors from the University of Michigan Law School, by a separate team of practicing lawyers, and also by three law students who were working in the office of one of our committee members during the summer. Finally, two members of our committee, Mr. Lafitte and Mr. Lane, interviewed Judge Scalia.

Based on our investigation the committee is unanimously of the opinion that Judge Scalia is entitled to the committee's highest evaluation of a nominee to the Supreme Court—well qualified. That evaluation is reserved for those who meet the highest standards of professional competence, judicial temperament, and integrity. Persons in this category must be among the best available for appointment to the Supreme Court.

I have filed with this committee yesterday a letter describing the results of our investigation and will not repeat those results in detail here. But I do request that the letter be included in the record of these hearings.

Senator **Specter**. The letter will be made a part of the record, without objection.

Mr. **Fiske**. Thank you, Senator.

[Information follows:]

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August 5, 1986

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to the invitation to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to submit its opinion with respect to the nomination of the Honorable Antonin Scalia to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Judge Scalia is based on its investigation of his professional competence, judicial temperament and integrity. Consistent with its long standing tradition the Committee's investigation did not cover Judge Scalia's general political ideology or his views on issues except to the extent that such matters might bear on judicial temperament or integrity.

The Committee investigation included the following:

(1) Members of the Committee interviewed the Justices of the Supreme Court of the United States and a large number of other federal and state judges throughout the United States.

(2) Committee members interviewed a cross section of practicing lawyers across the country.

(3) Committee members interviewed a number of deans and faculty members of law schools throughout the country.

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(4) A team comprised of the Dean and professors of a prominent law school and a separate team of practicing attorneys reviewed Judge Scalia's opinions. They were also reviewed by three summer law students working in the office of one of the Committee members.

(5) Two members of the Committee interviewed Judge Scalia.

Professional Background

The Committee's investigation revealed that Judge Scalia's career has included service as a practicing lawyer, a law school professor, a lawyer in government service, and a federal circuit judge. He received a B.A. degree with highest honors from Georgetown University in 1957, and graduated from Harvard Law School with an LL.B., magna cum laude, in 1960. He was admitted to the Bar of the State of Ohio in 1962.

After serving a year as a Sheldon Fellow of Harvard University, Judge Scalia practiced law in Cleveland, Ohio, as an associate of the firm of Jones, Day, Cockley & Reavis. He then served as an associate professor at the University of Virginia Law School from 1967 to 1970, and as a professor from 1970 to 1974 (on leave 1971 to 1974).

He was General Counsel, Office of Telecommunications Policy, Executive Office of the President, from January 1971 to September 1972, at which time he was appointed Chairman of the Administrative Conference of the United States, in Washington, D.C., until August 1974. He was an Assistant Attorney General, Office of Legal Counsel, in the Department of Justice in Washington from August 1974 to January 1977. He was a visiting professor at Georgetown University Law Center from January to June 1977, and later in 1977 he became a Professor at the University of Chicago Law School. He served there until 1982 (on leave 1980 - 1981 as visiting professor, Stanford Law School). In 1982 he was nominated by the President to the United States Court of Appeals for the District of Columbia Circuit, and in that year his nomination was confirmed by the Senate.

Through interviews of those who worked with Judge Scalia during the various stages of his professional career, the Committee has concluded that he has demonstrated outstanding competence, the highest integrity, and excellent judicial temperament.

Interviews with Judges

The Committee interviewed more than 340 persons during its investigation, over 200 of whom are federal and state judges, including the Justices of the Supreme Court of the United States. Most of those who know him spoke enthusiastically of his keen intellect, his careful and thoughtful analysis of legal problems, his excellent writing ability and his congeniality and sense of humor. Almost all who know him, including those who disagree with him philosophically and politically, expressed admiration for his abilities, and for his integrity and judicial temperament. He is described as "learned and studious," "always well prepared," "very congenial," "a person of excellent character and scholarship" and "careful and thoughtful and not inflexible."

Many judges who do not personally know Judge Scalia have a favorable impression of him based on his reputation and their reading of opinions he has written. The judicial community was strong in its praise of Judge Scalia's qualifications.

Interviews with Lawyers

The Committee has also contacted about 80 practicing lawyers throughout the United States. We interviewed a cross section of the legal community, including women and minority lawyers. Having practiced law in Cleveland, taught in law schools in Virginia, the District of Columbia, Chicago and in California, having served as a federal judge and in government service in the District of Columbia, and having chaired the Administrative Conference of the United States, and the Administrative Law Section of the American Bar Association, Judge Scalia has been brought into contact with and worked with lawyers across the country. From the standpoint of his intellect and competence, temperament, and integrity he is very well regarded by almost all of those who know him. Lawyers have commented that "he is always well prepared, he asks the right questions and writes exceedingly well"; that arguing before Judge Scalia is "an exhilarating experience"; that he has "strong intellectual capabilities"; that he is "very fair"; and that he has "a warm and friendly personality." There were isolated expressions of concern, or objections, about a lack of openmindedness or the reasoning in his opinions.

Interviews with Deans and Professors of Law

The Committee interviewed more than 60 deans and faculty members (including specialists in constitutional law and scholars of the Supreme Court) across the country, many of whom know Judge Scalia personally. He is uniformly praised by those who know him for his ability, writing skills and keen intellect. Again, there were isolated expressions of concern about his strong conservatism or a lack of openmindedness.

Survey of Judge Scalia's Opinions

Judge Scalia's opinions were examined for the Committee by the Dean and a group of law school professors at the University of Michigan and by a separate group of practicing attorneys. Both of these groups expressed high praise for his intellectual capacity, his clarity of expression, his ability to analyze complex legal issues, and his organization and articulation of ideas. He is regarded as a splendid legal writer. Three summer law students who also reviewed his opinions expressed concern about his openmindedness.

Interview with Judge Scalia

Judge Scalia was interviewed by two members of the Committee and the discussion covered the adverse comments and objections that had been received by Committee members. This discussion, against the background of our investigation, satisfied our Committee as to any question that had been raised. Judge Scalia impressed the interviewers as a highly intelligent, articulate and congenial person. He appears to be a very hard worker, and highly enthusiastic about his role in making the legal system work properly.

Based on the Committee's investigation, it has unanimously found that Judge Scalia has all of the professional qualifications required of an Associate Justice of the Supreme Court of the United States. Those who know and have worked with Judge Scalia describe him as intelligent, analytical, thorough and hard working. His diversity of experience as a practicing lawyer, a lawyer in government service, an academician and a judge provides a valuable background for service on the Supreme Court.

Furthermore, the Committee's investigation reveals that Judge Scalia's integrity is beyond reproach, and he is well regarded for his judicial temperament. Judge Scalia is among the best available for appointment to the Supreme Court, and he is entitled to the Committee's highest evaluation of a nominee to the Court because of the high standards he meets in terms of professional competence, judicial temperament and integrity. Accordingly, we unanimously find him "Well Qualified".

This report is being filed at the commencement of the Senate Judiciary Committee's hearing. We will review our report at the conclusion of the hearings, and notify you if any circumstances have developed that require modification of our views.

Respectfully submitted,

ROBERT B. FISKE, JR.
Chairman

Mr. **Fiske**. To summarize our findings, Judge Scalia has an outstanding academic record and has demonstrated strong abilities in his service as a practicing lawyer, a teacher of law, and as an appellate judge. Our investigation has shown him to be extremely intelligent, analytical, thorough, hardworking, and devoted to the legal profession. His writing and analytical skills are widely acclaimed. The diversity of his experience as a practicing lawyer, as a law teacher in four of the outstanding law schools of this country, and as a Federal appellate judge provide a valuable background for a Justice of the Supreme Court.

Notwithstanding isolated expressions of concern, our investigation revealed that Judge Scalia has an outstanding judicial temperament and that he is well suited for service on the Supreme Court from that standpoint. He enjoys the respect of his colleagues both on and off the bench for the soundness of his judgment and his congeniality. His integrity is above reproach.

In conclusion, the committee by unanimous vote has found Judge Scalia to be well qualified to serve as an Associate Justice of the Supreme Court of the United States.

Thank you very much.

Senator **Specter**. Thank you, Mr. Fiske.

I note from vour report on page 3 that you interviewed a cross section of the legal community, including women and minority lawyers. How many of the 340 persons interviewed came from the category which you label as "women and minority lawyers"?

Mr. **Fiske**. I am not sure I am in a position to give you a precise number, Senator, and perhaps, if you wold like that, I will go back through the detailed interviews that we had.

But the way this is——

Senator **Specter**. I think the committee would be interested in the specifics, but can you give us an approximation at this time?

Mr. **Fiske**. If I can say, Senator, just so you understand the way this process worked, I will be glad to answer the question.

What we did right from the beginning was, as you know, we have a member in every judicial circuit and two in the ninth circuit. And what we asked each member to do was to go out in his or her circuit and conduct interviews with the Federal circuit judges in that circuit, the Supreme Court, the judges of the highest court in the State, leading lawyers, the presidents of the bar associations in the circuit, and also, of course, deans and members of the faculty of the leading law schools in the circuit. So we had a fairly standardized approach within each circuit which each circuit member then implemented. And then what we have done in the letter is try to pull together the results of some 13 separate investigations of that nature. That is where we get the number that appears in this letter.

Senator **Specter**. Well, I understand that, Mr. Fiske, but since a question was raised as to the issue of women and minority interests, I am directing the question specifically to get some, idea for the committee as to or what proportion comprises the women and minority lawyers.

Mr. **Fiske**. Well, again, I cannot give you a precise number because I have not gone——

Senator SPECTER. I understand you cannot give a precise number. Can you give an approximation?

Mr. FISKE. I would say more than 10 percent. That is a rough judgment.

Senator SPECTER. The report that you have submitted speaks very glowingly of Judge Scalia, as does your summary here this morning. There is one comment at the bottom of page 3, "There were isolated expressions of concern, or objections, about a lack of openmindedness or the reasoning in his opinions."

In order to give as full a picture as possible with any qualification being limited, would you please expand upon that sentence and focus particularly on, first, how isolated were the expressions of concern?

Mr. FISKE. Yes. Well, first of all, Senator, as you probably noted, that sentence appears in the section of our letter that is headed interviews with lawyers. This does refer to isolated expressions of concern that came from people within the group of about 80 lawyers that we interviewed.

I would say, again, it is a handful, probably not more than five at the most. And it came primarily from people who had argued cases before Judge Scalia who felt—I remember one or two comments to this effect—that during the argument they felt that he had a position that he was expressing through questions that he was asking, and these were people who had lost the case and who felt that perhaps he made up his mind and did not really come with a full openmindedness to the issue.

I really should emphasize, though, that we used the word "isolated" very carefully. We searched for a word that we thought was appropriate to try to quantify that type of objection. And really, I think "isolated" is the best word we could come up with because overwhelmingly the sentiment of lawyers was to the contrary.

Senator SPECTER. As to those isolated expressions, was their conclusion that Judge Scalia was qualified to be a Supreme Court Justice nonetheless? Or were their objections sufficiently strong, at least in their own minds, to oppose his confirmation?

Mr. FISKE. I do not remember any lawyer that said he felt so strongly about it that he did not think Judge Scalia should be on the Supreme Court.

Mr. LAFITTE. Senator, if I may supplement Mr. Fiske's remarks. I think there were a couple of lawyers who did indicate objection to the appointment based on one case that I recall, judicial philosophy; another case because of prior opinions without any explanation as to what in the prior opinions was the problem.

But I do recall those in response to the Senator's question. I certainly share Mr. Fiske's comments concerning the isolated nature of these objections or concerns.

Senator SPECTER. Continuing to the top of the next page where you have a category of interviews with deans and professors of law, you say, "Again, there were isolated expressions of concern about his strong conservatism or lack of openmindedness."

Can you quantify the number of those who expressed those concerns?

Mr. FISKE. Again, I would say it is less than 5, Senator, out of 60. Out of the more than 60 that we interviewed, it is less than 5. Probably two or three.

Senator SPECTER. I think it would be helpful to the committee, Mr. Fiske, if you would be a little more specific on that. If you could give us precise numbers, I think there are some who would be interested in it. And as a matter for future report writing, at least speaking for myself, where you have some expression of concern, the more specific you can be, the more helpful it is.

Mr. FISKE. I will try to get you the exact number, but I am quite confident it is in the vicinity of two or three.

Senator SPECTER. As to those isolated expressions of concern, did any rise to the height of objecting to the confirmation of Judge Scalia?

Mr. FISKE. Again, I do not recall anyone that would have opposed his confirmation on that basis.

Senator SPECTER. Thus, what you are saying is that on the total of these 340 persons interviewed, although there were some isolated expressions of concern, no one opposed his nomination to the Supreme Court?

Mr. FISKE. Well, I would qualify that only to the extent that Mr. Lafitte did a moment ago, that there were perhaps two or three of the 340 who felt that because of positions he had taken in some of his prior opinions or because of his judicial philosophy, he should not be appointed to the Supreme Court. But as you well know, our analysis does not really get into the question of judicial philosophy.

On the issues that we look at—integrity, professional competence and temperament—I would say that there are, again, less than a handful of the 340 that would have opposed the confirmation.

Senator SPECTER. Your analysis does not get into the issue of philosophy, but that is brought up by others on their own.

Mr. FISKE. Yes; it is quite often gratuitously volunteered.

Senator SPECTER. All right. Thank you very much, Mr. Fiske, Mr. Lafitte, and Mr. Lane.

Senator Heflin had arrived first, and I think the Chairman has announced the policy of moving through the sequence in order of arrival of the Senators. We will turn to Senator Heflin at this time.

Senator HEFLIN. I suppose, Mr. Lafitte and Mr. Lane, I would like to know about your interview with Judge Scalia. How long did your interview last with him?

Mr. LAFITTE. I think about an hour and a half, Senator.

Senator HEFLIN. What was the scope of your interview? What did you cover in your interview?

Mr. LAFITTE. Well, we discussed some of his ways of proceeding on the court, how he functions in the appellate court that he now serves, how he uses law clerks, how he writes opinions, that kind of thing.

Actually, the discussion—as is usually the case—was rather wide ranging. We discussed something briefly about his personal life. We talked about, of course, the concerns that we had heard and received his responses to those matters.

I think we talked some about his early life. Those are the things that come to my mind, Senator Heflin.

And as I say, this is usually the kind of discussion we have with a candidate for the Federal Judiciary.

Senator **Heflin**. Did you go into issues like federalism or civil rights or women's rights, or did you discuss any of the contemporary issues of the day, judicial issues?

Mr. **Lafitte**. Well, I certainly would encourage Mr. Lane to amplify my remarks, but we did raise generally those issues because they had been suggested to us as matters that might affect his judicial temperament because there had been expressions of concern about his openmindedness with respect to such matters. So we talked in general terms about them.

Senator **Heflin**. Did you talk, covering the issue of freedom of press, some of his decisions in those types of issues?

Mr. **Lafitte**. I do not think we discussed them specifically. I think we raised the first amendment cases as a matter of some concern that had been voiced, but just in general terms.

Mr. **Lane**. I would merely add the fact that we did mention first amendment concerns that had been raised with us. One of the purposes of this type of interview is to give the candidate an opportunity to explain to us his or her side of any issue that may come up in the course of the investigation.

Senator **Heflin**. Well, was he open and candid with you? Did he discuss these issues, going into some detail and explaining his position?

Mr. **Lane**. As best I can recall, none of this discussion was very lengthy. He was open. He was very relaxed and very friendly, and I think readily responded to any of the questions that we put to him.

Senator **Heflin**. Was he elusive or evasive?

Mr. **Lane**. Not at all, Senator. Not at all.

Senator **Heflin**. Did he attempt to, in your discussions with him, decline to answer any questions on the basis of the fact that it might interfere with his future as a potential member of the Supreme Court, that his discussion of the issues with you might, in effect, be considered as some sort of prejudging or prejudicing his mind or something to discuss it?

Mr. **Lane**. No; I am trying to recall. I do not recall, Senator, questions that were so specific as to give rise to that kind of a problem in his mind. But he was very open with us and responsive to us as we talked about these concerns.

And I think it is fair to say that his reaction was that one can always understand how there are people that will differ with one's decisions on issues of this kind, but that, in effect, he just does his best as a judge to come out where he thinks the law takes him.

Senator **Heflin**. I think Judge Scalia, of course, from everything I know about him, is a very fine individual, fine jurist, brilliant mind; but yesterday in our discussions and as the various questions were asked of him, I ended the day with a sense and feeling that he had been elusive, evasive, and had perhaps overly hidden behind some concepts of separation of powers or on the fact that he might have prejudiced himself in answering questions.

Now, I do not want to be unfair to him in any way, but I did come away with somewwhat of a feeling that he did not answer things that I thought he should have answered. I did not think that the potential of being positioned on the Court necessitated his protective attitude over future writings or future decisionmaking that he might have.

Was there any of that feeling relative to your discussions with him or was he completely open?

Mr. **Lafitte**. Senator, I will let Mr. Lane answer for himself, but I found him completely responsive. I do not recall any question that we asked him that he indicated he would rather not answer or he thought he should not answer. My sense certainly was that he was completely open with us and forthright and very articulate in responding to our questions.

Mr. **Lane**. I think, so the record will be clear here, we did not try to press him on important issues of the day. We did not try to find out how this man would vote on these important and difficult issues. I think we were sensitive to the problem, and I think we also understand and sympathize with the problem you have in making your judgment in the process of confirmation.

I think it is a difficult problem for the committee, and it is a difficult problem for the candidate. We really did not try to press him in these areas as the committee did yesterday.

Senator **Heflin**. Well, it is very difficult and it is a task I could not help but compare Associate Justice Rehnquist's responses and his answers. I thought Justice Rehnquist was much more open and gave more answers relative to the matters than Judge Scalia did.

But it is a task. Of course, we have a line to draw and maybe we are more protective of our role in advice and consent and maybe he is more protective of his role, but I did have that feeling. I just did not know whether it might have been or whether from the Rehnquist hearings to the Scalia hearings there might have been some coaching.

That is all.

Senator **Specter**. Senator Simon.

Senator **Simon**. Thank you, Mr. Chairman.

I would just note that after hearing of Judge Scalia's many significant virtues, the lawyers, the deans and professors, and the students all list this one concern they have; lack of openmindedness.

We can all learn from our critics, and if Judge Scalia is viewing this or reads the transcript, I hope perhaps he will note that.

I would just lobby Mr. Fiske, whom I have lobbied before on this, but I would like to do it publicly. This has nothing to do with the Supreme Court nominees now but goes back to our earlier conversations. I would encourage the Bar Association to raise its standards for approval for Federal judges.

It is something I think we can do in this Nation. We have 640,000 lawyers. I think we can find some of the very finest for the Federal judiciary, and I think the American Bar Association committee can play a very important part in accomplishing this goal.

Mr. **Fiske**. Senator, I would respond publicly as I have to you privately in our earlier discussions. We believe this committee has high standards. They are set forth in the public document that we call our "Backgrounder." The individual members of the committee do not always agree on every candidate with respect to how that candidate measures against those standards.

We get divided votes among our committee with respect to the qualifications of the candidates, but one of the reasons we have separate ratings, exceptionally well qualified and well qualified in addition to a basic rating of qualified, is that we hope that the administration will propose as many people as possible who fall into those higher categories or ratings which, by our own definition, means that we, the committee, find them to be among the best available for appointment.

We rejoice, as you would rejoice, when we are able to find a candidate well qualified. We would like to see all the candidates well qualified or exceptionally well qualified.

Senator SIMON. Let me just say in response that I think you have to be not too sophisticated in dealing with Members of the U.S. Senate. We should be getting a message when someone does not come in extremely well qualified or well qualified, but rather with a mixed qualified-not qualified rating.

I think somehow you have to devise a system whereby you send a clearer and stronger signal to the members of this committee and to the full Senate. We have carried on this conversation before, but I would simply urge you once again to review how you handle judicial nominees to see if we cannot do a better job.

Mr. FISKE. We will, Senator.

Senator SIMON. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Thank you, Mr. Chairman.

Mr. Fiske, I want to underline what Senator Simon has just outlined here. I think all of us find useful the kinds of evaluation that the Bar Association does in terms of professional competency and the judicial temperament, the basic integrity of the various nominees. But quite frankly, you were up here with regard to Justice Rehnquist talking about those qualities, and you did not really comment about the whole question to the *Laird* v. *Tatum* and the judicial ethics about ruling on that type of case, whether you people felt that was important, whether you thought we ought to explore that issue. You did not come to our committee and indicate that it would be important for us in making our judgment that we gain certain information in terms of his work in the Office of Legal Counsel, or helpful.

I did not hear anything from you people with regard to the whole question of executive privilege, whether you felt in terms of our function and the availability to provide good information to the U.S. Senate and the American people in meeting our responsibilities, whether we should have that information or not have that information.

I was here when the Bar Association came up here and recommended Carswell, and that would have been a travesty to the Supreme Court of the United States. Yet you recommended him as qualified. He met the particular standards. You know, he could write a good legal brief. Nobody was complaining too much about him in the back room.

And I think in terms of the relevancy of the ABA, and the American people have to put a good deal of confidence in the organization. I quite frankly felt that we all knew that Justice Rehnquist could write a good legal brief. He was No. 1 in his class at Stanford Law School. And you reiterated that.

But we went through 2 hard, difficult days trying to help this institution help the American people to understand better what this whole process was about. And in looking back on the testimony that the people gave with regards to Rehnquist, I do not think that you really helped one bit on that issue, to be perfectly blunt about it.

And now we have it with regard to Judge Scalia, and I am quite prepared to, you know, get on with other kinds of witnesses. I do not think anybody has doubted or questioned that he is enormously able and gifted and a talented person on it, but on the kinds of issues that Senator Heflin was talking about, the kind of criteria, what we ought to be able to expect in terms of responsiveness of a witness, I think you ought to be helping us, helping the American people, trying to help establish what should be able to be asked. The American people then understand that we are probing into his mind in terms of potential future cases or whether we have a legitimate right to understand these questions.

You people have professors, access to people who could have the luxury of spending some time and can help us on these kinds of issues. And I think you probably gather, at least from some members of it, the fact that, you know, I for one am glad to have you come by here and make these statements, but I think as others have expressed, if you are going to be relevant at all with regard to various appointments, I think that you have to be able to be a good deal more comprehensive in terms of what you are going to observe and what you are going to comment on.

Mr. **Fiske**. Well, Senator, I would just like to make an initial response, and then Mr. Lafitte, who was here last week presenting the committee's position with respect to Justice Rehnquist, will, I am sure, have something further to say.

I think it is important, and I am sure you do understand the basic function of the American Bar Association when it comes to passing on the qualifications of judges. We view our principal responsibility to bring first to the Justice Department for their consideration, and then second to the Senate for its consideration, the result of our analysis which is basically going out and getting the views of the persons, the peers at the bar and on the bench, people who have practiced with the particular candidate, judges before whom the candidate has appeared, lawyers that have litigated with or against the candidate. In the case of someone going to the Supreme Court who is a sitting judge, what law professors in a leading law school think, as professors, of the quality of the candidate's or the judge's writing skills.

We basically look, Senator, as I believe you know, at professional qualifications as reflected through the views of the people that we think know the candidate best.

Senator **Kennedy**. Let me ask a question. Do you still say that Carswell was qualified?

Mr. **Fiske**. Senator, none of us were on the committee at that time. I think——

Senator **Kennedy**. Well, I mean, he wrote well. You know, evidently he had gone through the various process. I have not read anything from anybody that is saying that we missed one on that particular case, and I see nothing on the ABA that says we missed it, we ought to review our process, we ought to review our system so that we can be more helpful to the Senate Judiciary Committee where we have 1,000 different issues—on copyright, on judicial nominees, on civil rights, civil liberty issues and questions—and say, look, we missed one on that. What has been wrong? Why can we not have a different criteria? How can we review our whole recommendation?

Mr. Fiske. Senator, I would disagree with you to this extent. My understanding in reviewing the history of the committee is that the committee did go through a major restructuring of its procedures for investigating Supreme Court nominees following the Haynsworth and Carswell incidents back in the late 1960's or early 1970's. And the type of process that we have gone through that is reflected in the letter that we submitted here where we talked to more than 340 people around the country, was specifically designed to try to uncover or have a procedure that would be designed to uncover some of the things that apparently were not uncovered in the case of Justice Carswell.

But I am talking secondhand on this. I am just talking about what I have been able to learn from my review.

Senator Kennedy. One of the things that you missed was the membership, for example, of Carswell in various clubs that were not open and that were restricted.

And now we have had those same kinds of things right back here with Justice Rehnquist. You missed it last time and you missed it this time.

Mr. Lafitte. Senator, may I——

Senator Kennedy. And the only thing in what I just mentioned, you give a very broad recommendation that has to impact the American people. It does the Members of the Senate. We have all heard the last time a broad recommendation, and it seems to me that the areas in which you examine are limited. You know, the total kind of requirement that we have meeting our responsibility. It is always of some use.

Mr. Fiske. Well, I think, Senator, some of the things that you put to us a minute ago may be beyond the proper scope of our committee's function.

Senator Kennedy. Well, do you not think that that would be useful to mention when you say we find well qualified that we are talking about just very, very limited areas on this. You do not find a distinction, but you are saying that the American Bar Association which has a very profound and significant reputation, and in many instances well deserved, among lawyers and among the American people. And you come in with a broad kind of mandate, and you are only looking at a rather limited area. I think it is something that in terms of a responsible organization you ought to distinguish.

Mr. Fiske. Well, Senator, I think we make it very clear in the second paragraph of our letter that the committee's evaluation of Judge Scalia is based on its investigation of his professional competence, judicial temperament, and integrity. We go on to say consistent with its longstanding tradition, the committee's investigation did not cover Judge Scalia's general political ideology or his views on issues except to the extent that such matters might bear on judicial temperament or integrity.

And I would say that the question you raised that relates back to what Senator Heflin was asking about the extent to which Judge Scalia should or should not have taken positions, yesterday here before this committee on matters that may come before the Supreme Court, are covered by ABA canons and there are ABA canons that say that a judge should not publicly take positions. And we have made that clear to this committee in the past.

Senator KENNEDY. The question, I suppose, is when you come down hard on the issues of integrity, I suppose there were some questions here—certainly Mr. Brosnahan with regards to Rehnquist, Mr. Smith and other persons in that old voter-harassment situation—would raise serious questions about that nominee on that very issue.

Mr. LAFITTE. Senator, I have been trying to—I think those are legitimate questions, but I do think you need to understand the circumstances.

You mentioned two incidents; one was the *Tatum* v. *Laird* case and the other was the Phoenix voting situation and the executive privilege issue.

Now, our investigation was completed many days and our report was made to the Department of Justice many days before the issue of the Phoenix voting matter ever was raised in the media.

Now, I understand it was raised in the first hearings, of course, but the coming forward of additional witnesses occurred after our report was completed.

Now, our feeling was that those people, we understood, were going to be here to testify. If there was something else, of course, that this committee wanted us to do in terms of integrity or temperament, naturally we would be happy to help in any way we could in that respect.

The other thing——

Senator KENNEDY. The point is——

Mr. LAFITTE. May I just finish, Senator?

The other thing is the *Tatum* v. *Laird* issue which, so far as I know, came to light on the Monday morning of the week that I came up here. It certainly was not in anything in light of the investigation we did, and that was the case also of the Phoenix voting matter. There, again, Justice Rehnquist's position was as stated in his opinion denying the motion to disqualify. There, again, we are pleased to provide any service we can if this committee wants us to do additional work.

But the point is that those matters arose after our investigation was completed and we had reported.

Senator KENNEDY. I think that comment really indicts your whole kind of investigation, the whole question about the harassment of voters was a part of the record the last time, that Justice Rehnquist appeared before this committee, and it only came up after that.

Mr. LAFITTE. I said that.

Senator KENNEDY. So this is not any surprise. This is a question that reaches the issue of integrity and no mention was made about that. You were really of no help to this committee on that issue, as

I understand it. It was not even referenced in your statement. I may be wrong, but you did not raise that.

Mr. LAFITTE. It was never raised to us in our investigation either.

Senator KENNEDY. Now *Laird* v. *Tatum*. Someone in that bar association ought to read McKenzie's book on that, and the chapter on that very case that was printed in the 1970's. We all had the chapter on that. Why did not the bar association have it?

That is not revolutionary, for pete's sakes. McKenzie is a distinguished writer for the New York Times who writes about the Supreme Court. And I have got one staffer who was able to find that. It seems to me, with all of the team that you have got, you ought to be able to raise that, at least bring that matter—it is a subject of a good deal of inquiry here. And for you to say, well, you did not know about that until you came before this committee is difficult——

Mr. LAFITTE. What I am saying, Senator, is it was not raised in our investigation. It was not raised to us as an issue, and therefore, not something we really reviewed before we came here.

Senator KENNEDY. Well, I would take the time, but you are not the nominee, on the whole question of whether it should have been or should not be an issue in terms of recusing, but that is not what we are about here. Thank you.

Mr. LANE. Senator, if I may add—may I further respond to Senator Kennedy?

The CHAIRMAN. You may respond. Go ahead.

Mr. LANE. Just briefly.

The CHAIRMAN. Speak louder now so we can hear you.

Mr. LANE. I think that once we saw the voter rights thing coming up again in these proceedings, it was at least my judgment, that this committee had subpoena power, and had the ability to get these witnesses, and has access to FBI reports. We really do not have the capability of getting as deeply into an issue like that as you can. And furthermore we are not perfect.

You know, we cannot do all of the work of this committee, and although I have been on this committee for only 3 years, I want to tell you, that I have been impressed with the dedication and the hard work of the members of the committee, and I have enjoyed serving with them. I think they do make an effort to help. We have no role in the selection of who is to be nominated. They just give us a name, and we go forward, and we do the best we can.

Senator KENNEDY. You have been a great help to our committee.

Mr. LANE. Thank you, Senator. I appreciate that.

The CHAIRMAN. In addition to your investigation, the FBI investigates these personal points. The Judiciary Committee also has majority and minority investigators investigate the man. For the record, I just thought that ought to be shown.

The distinguished Senator from Utah.

Senator HATCH. Thank you, Mr. Chairman.

It should be shown, that both the majority and minority have every right to investigate here. That is our job. We are paid for that.

How much are you fellows paid for doing your job?

Mr. FISKE. We put it in negative terms.

Senator HATCH. You are paid in negative terms. This costs you time.

Senator KENNEDY. Are you asking them their salaries, or——

Senator HATCH. No. I am asking them how much they are paid for performing this public service. That is what I would like to know.

Senator KENNEDY. Is that pro bono?

Senator HATCH. Why don't I ask the questions. I did not interrupt you, Senator.

The CHAIRMAN. Senator Hatch has the floor.

Senator HATCH. I have a feeling that all of you have given pro bono services, as most attorneys do for the poor, and those who are afflicted.

Now I am asking you, just for the benefit of the public at large, so everybody understands what is going on here?

Mr. FISKE. I think you should know, Senator, that all of us volunteer our time.

Senator HATCH. I know that. I want the public to know that. And I want them to know how much time it takes to do something like this, then come here and get attacked for doing it.

Because you are not into every case that is involved in this matter. They have the right to ask any questions they want. We can keep these hearings going, I guess forever, if we want too.

But the fact of the matter is, you have a particular responsibility. You do it voluntarily. You take time from your business and your office. It costs you money to do it. And you are doing it because of a love of the law, a love of the bar association a love of integrity and justice in this country. Would that be a fair summarization?

Mr. FISKE. I think you put it very well, Senator.

Senator HATCH. I thought so, too. [Laughter.]

Mr. LAFITTE. We could not do better, Senator.

Senator KENNEDY. I would even agree with that, Orrin.

Senator HATCH. I knew I would get Kennedy to agree with me on something. Now if you will just agree on Rehnquist and Scalia, it would show what a great man you really are.

Mr. FISKE. I think to quantify it, I think it perhaps would be of interest to this committee to know, that in a typical investigation that is done by one of our circuit members on a candidate, that investigation can take as much as 2 weeks of the committee member's time to complete.

As chairman of the committee, I can tell you that I have spent 300 to 400 hours a year on the work of this committee.

Senator HATCH. I am not asking what your hourly billings are, but I know they are worth a lot of money. It is a loss for your own business to do it for these purposes. You deserve commendation.

I have to admit I have been fairly critical of some of the evaluation process in the past. It has been a wonderful experience for me to hear you three gentlemen testify and to learn how exhaustively you go into these matters. And how you do it for the right reasons.

I cannot say I have always agreed, but on the other hand, I have a lot of respect for what you do. Let me just ask you some questions. Is it correct, Mr. Fiske, that well qualified is the ABA's highest rating for a Supreme Court nominee?

Mr. FISKE. Yes, it is, Senator.

Senator HATCH. And that is the rating that you have given to Judge Scalia here?

Mr. FISKE. Yes, sir.

Senator HATCH. There is no higher rating that he could get for this nomination. Is that right?

Mr. FISKE. That is correct.

Senator HATCH. Now could you tell us how many deans, and law professors, your group interviewed, in your evaluation of Judge Scalia?

Mr. FISKE. More than 60.

Senator HATCH. You went to more than 60 deans of law schools and law professors. Is that correct?

Mr. FISKE. Yes. The procedure, Senator, was that within each circuit—we, as you know, we have a member from each circuit.

Senator HATCH. Yes.

Mr. FISKE. That circuit member went to the dean and prominent faculty members in each of the leading law schools in his or her circuit to obtain their views on Judge Scalia.

Senator HATCH. Am I correct that they were virtually unanimous in support of Judge Scalia?

Mr. FISKE. Yes, sir.

Senator HATCH. These are the academically learned in the law in this country. Is that right?

Mr. FISKE. Yes. We also had his opinions reviewed by the dean and a group of professors at the University of Michigan Law School.

Senator HATCH. How many opinions did they review?

Mr. FISKE. Well, he had 107 published opinions. They reviewed all of them. And I believe there were another maybe 60 or 70 unpublished, and I believe they reviewed a representative cross-section.

Senator HATCH. They virtually reviewed all of his opinions. I take it you then subreviewed those opinions as well, or at least members of your committee did in your review?

Mr. FISKE. We had two separate reviews. We had one by the University of Michigan dean and law professors, and we had a separate review conducted by practicing attorneys in a major law firm, and they both came to the same conclusion.

Senator HATCH. What conclusion was that?

Mr. FISKE. That they both spoke very highly of Judge Scalia's writing ability, his intellectual capacity, his ability to analyze legal issues, his ability to clearly and lucidly state the issues in the case, and the reasoning process by which he arrived at a decision.

Senator HATCH. It sounds like he might make a terrific Justice, based upon those qualifications.

Mr. FISKE. Well, that is the conclusion our committee came to; yes, sir.

Senator HATCH. How many Federal and State judges did you interview?

Mr. FISKE. Approximately 240.

Senator HATCH. 240 Federal and State judges?

Mr. Fiske. I am sorry. About 200. There were 340 persons interviewed; all together, about 200 of those were Federal and State judges.

What we tried to do was, again, on this nationwide basis, circuit by circuit, we tried to go to the chief judge of the highest court in every State in the country. And in addition to the chief judge of the Federal circuit courts——

Senator Hatch. In other words, you went to the chief justice of every State in the country, or tried to?

Mr. Fiske. Yes. Every one that we were able to——

Senator Hatch. The top justice at the State courts in every State of this Union?

Mr. Fiske. Every one that we were able to reach in the State courts and in the Federal courts. We went to the chief judge of each of the circuit courts of appeals, and each of the Federal district courts throughout the country, and also, representative other circuit judges throughout the country.

Senator Hatch. And they were virtually unanimous in supporting your opinion?

Mr. Fiske. Yes, sir.

Senator Hatch. How many practicing lawyers did you interview?

Mr. Fiske. A little more than approximately 80.

Senator Hatch. Eighty practicing lawyers, a lot of whom are practitioners before the Supreme Court?

Mr. Fiske. Yes. And another thing we did: we picked what we considered to be a group of 25, of Judge Scalia's leading opinions, and we made a list of the lawyers that had appeared——

Senator Hatch. You went to both sides; those who won and those who lost?

Mr. Fiske. Yes. In all of our investigations, one of the important things we do with respect to any sitting judge is, we always go to lawyers who have lost cases before that judge.

Senator Hatch. And what was the consensus of the lawyers?

Mr. Fiske. Well, the consensus of the lawyers was again, they had the highest praise for Judge Scalia's judicial competence, his temperament and his integrity.

Senator Hatch. As I see it, you have made an exhaustive study. You have done it for the good of our country. It was a nationwide study. You interviewed 380 people from every State in the Union and virtually everybody said he would make a terrific Supreme Court Justice?

Mr. Fiske. Yes. As our letter indicates, and as I said earlier, there were isolated expressions of concern, but the overwhelming consensus was a high degree of enthusiasm for Judge Scalia.

Senator Hatch. I do not know who could be nominated that there would not be some modest expressions of concern, no matter how great the reputation.

Your report places Judge Scalia in very good shape. I want to tell you that I have been critical of this process from time to time. But having sat through Justice Rehnquist and now, Judge Scalia's hearings, and listening to you, I have changed my opinion.

You deserve the highest praise, especially in these two instances, for what you have done. I cannot see any way that there was any politics or partisanship, or preferences, or any other kind of an approach that could be critcizable under the circumstances. You are not the U.S. Senate. It is not your job to go into every last detail concerning his life, nor do you have investigators to do this with.

You do this voluntarily. I want to compliment you. You have done this committee, the U.S. Senate, and the country a great service.

Mr. LANE. Thank you, Senator.

Mr. FISKE. Thank you, Senator.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. It is nice to see the members of the bar association here again, and I do not want you to go away feeling too good about those praises that our distinguished friend on the far right was talking about. The far right was saying that the American Bar Association really was not anything to be particularly paid attention to, when you gave a rating, and the very lowest possible rating to Judge Manion when he was up for confirmation.

Senator HATCH. That was not the lowest rating at all.

Senator METZENBAUM. Oh, yes.

Senator HATCH. He got a qualified rating. He could have had an unqualified rating.

Senator METZENBAUM. They gave him the lowest possible rating that could be affirmative, which was a majority qualified and a minority unqualified, but it is just a question, I suppose, of which day of the week it is, whether you love, or hate, the American Bar Association rating system.

Senator HATCH. Would the Senator yield for just one comment?

Senator METZENBAUM. Are you going to let me go ahead? Are you going to let me go ahead?

Senator HATCH. Under President Carter we approved three who had unqualified ratings from the ABA.

The CHAIRMAN. Senator Metzenbaum has the floor.

Senator LEAHY. Regular order.

Senator METZENBAUM. One of the things that particularly concerns me about your report—thank you, Mr. Chairman—is this emphasis about a lack of openmindedness.

And it has not been discussed here today, although I did not get in to the opening session. But when you had interviews with lawyers, you said, "There were isolated expressions of concern, or objections, about a lack of openmindedness, or the reasoning in his opinions."

When you had interviews with the deans and professors of law, again there were isolated expressions of concern about his strong conservatism, or a lack of openmindedness. And when you took a survey of Judge Scalia's opinions and I quote your report—"three summer law students who also reviewed his opinions expressed concern about his openmindedness." Now that is about all you say about it. Now did you inquire further? Did that concern you, that that same word seemed to come up in each instance, regardless of which group you were speaking to?

Mr. FISKE. Senator Metzenbaum, Senator Specter asked questions earlier with respect to the very issue that you have just raised, and I would like to respond again.

First of all, I think the word "isolated" was a word, as I told Senator Specter, that we arrived at with some care, after trying to quantify the number of expressions of concern that we had. And in each category—that is, from the deans and the law professors, and also from the lawyers, the number of such expressions of concern, in each case was, I would say, less than five out of the total.

So the overwhelming number of people who commented on Judge Scalia, both from the academic side, as deans and professors, and from the practicing side, the lawyers, the overwhelming number of those were strongly enthusiastic about Judge Scalia and did not have a concern about openmindedness.

But in order to present the complete picture, we wanted to make it clear, that there were in each case, a few lawyers, and a few members of academia who had expressed that type of concern.

With the lawyers, one or two comments were made to that effect by lawyers who had argued cases before Judge Scalia, and who had formed the impression during the oral argument from the way Judge Scalia was asking questions, that Judge Scalia had come into the argument with a preconceived position, that to them reflected a lack of openmindedness.

And I think as Mr. Lafitte——

Senator **Metzenbaum**. Well, what concerns me is, did you—I have asked this in previous hearings and I did not get a satisfactory answer, and I am concerned that I am not going to get a satisfactory answer now.

There are other bar associations in this country. The Justice Department used to be willing to hear and did inquire of the other bar associations when there was a confirmation process occurring.

This Justice Department has closed doors to those other opinions. But the American Bar Assocation, I believe, therefore, has a special responsibility to find out what the Federal bar says, what the national bar association says, what the legal aide societies of the country say, what the women's bar association says.

Did you make inquiry of any of the other bar associations?

Mr. **Fiske**. We did, Senator, without—we did make inquiries of minority bar associations and women's groups. We told them we were doing this investigation and in each case we were told that that particular organization was in the process of making its own investigation. They had not reached a conclusion at that point, and they both said if they reached a conclusion, they would get back to us.

And at the time that we rendered our report, which we felt we were under some time constraints to do, we had not received an answer back from those groups.

Senator **Metzenbaum**. Well, I have some real concerns. I have been a member of the American Bar for many years myself, and I have some real concerns as to whether or not you are not letting the membership down, as well as your responsibility to this committee when you appear, in that you only make inquiries of law professors, lawyers, and judges.

And I am not at all impressed about the question of whether or not you have the resources, because there is no doubt in my mind that you do.

You all come from major law firms. Your law firms have no problem about making available investigators, or your own time, or junior members, to go out and do the investigating.

My real question is, Is it right, is it the correct thing to do? You do not actually say in your comments here. You say the committee's evaluation, based on its investigation of his professional competence, judicial temperament and integrity. You do not indicate, although through the report you say what groups say, but you do not say that our investigation is only limited to his peers at the bar and those on the bench. Now it would not have taken too much investigation, on your part, to find out some of the facts concerning Judge Scalia or Justice Rehnquist. But you did not do that.

I wonder if that is really appropriate, or do you think you only limit your activities to that having to do with lawyers?

Mr. FISKE. Well, Senator, first of all let me respond to one thing you said. To make it clear, the way this committee functions, because I think it is important that you understand.

We have, as I said before, one member in each circuit. Mr. Lafitte is the member of the fifth circuit.

Senator METZENBAUM. I understand that.

Mr. FISKE. It is a very important part of our process that that committee member personally does all of the interviews with the lawyers, judges, or whoever is being contacted in that circuit.

He does not delegate to junior members of his firm, or her firm. And the reason for that is very important. The members of this committee across the country are selected for their diversity, but also for their standing at the bar in their particular communities.

And across the country, these are men and women that——

Senator METZENBAUM. I understand all that.

Mr. FISKE. But it is important that you understand, Senator, by the reason of the fact that they do this personally, and they are people who are trusted in their communities, they get access to information on a confidential basis that we do not think we would get if we delegated a bunch of junior investigators to go out and do it.

Senator METZENBAUM. Mr. Fiske, I am talking about investigating facts. Investigating factual information does not have to be done by a lawyer. When you are talking to somebody, a judge, another lawyer, I understand it.

But let me pass on to something else that is very much within your area.

You say you do all this work, you are the bar association, the ethics committee of the American Bar Association had a proposed commentary, in their canon, which was adopted in August 1984, that no member—no member of the judiciary should belong to a club that practices invidious discrimination.

And the judicial conference passed a resolution indicating that a judge should not belong to a club that practices discrimination.

Now, when I inquired of Judge Scalia yesterday on this subject, I thought he sort of tried to make a distinction between invidious discrimination and discrimination.

It is a fact that the Cosmos Club does not admit women. Now, if you want to say, that is not invidious, then you probably ought to ask the women of this country.

But the question I am asking you is: How come there is nothing in your report about this issue that has to do with judges, has to do with the ABA canons, has to do with the judicial conference. And I looked through it, unless I overlooked it, you do not even mention the fact. Why?

Mr. LAFITTE. Well, Senator——

Senator METZENBAUM. That was very smart to give the question to him.

Mr. LAFITTE. The reason I took it, Senator, is that I did interview him.

Senator METZENBAUM. Excuse me?

Mr. LAFITTE. I did interview Judge Scalia along with Mr. Lane. And I think the answer, I guess the best answer to the question is: We did not ask him that questions, in that interview.

Senator METZENBAUM. My question to you, Mr. Lafitte, is, why didn't you? That is a judicial conference ruling. Why did you not? And therefore, can we expect that your whole report is that incomplete?

Mr. LAFITTE. Well, I do not think that is a fair conclusion, Senator.

Normally, when we conduct these investigations, we do have the benefit of responses to personnel data questionnaires, in which the judicial candidate does list the clubs and organizations he belongs to.

In this instance, Judge Scalia had updated his prior PDQ, personal data questionnaire response, to us; but quite frankly, I simply do not recall whether that information was in there. We did not ask the question that you are now raising to us. Of course it is true—if we had, I think the question would have been, do you belong to an organization that does exclude women or minorities from membership. And I believe, as I understand the response, it is that the Judge does not now belong to such an organization.

Senator METZENBAUM. Mr. Fiske, as chairman, I would hope that in your future investigations you will ask these questions and you will report back to this committee when you make your recommendations as to the fact.

Is that agreeable with you?

Mr. FISKE. Yes, it is, Senator. Mr. Lafitte indicated, I think, if the question had been asked, as I understood Judge Scalia's answer yesterday, he would have said he was not a member.

Senator METZENBAUM. I am not sure whether the judicial conference report calls for invidious discrimination. Let me say——

Mr. FISKE. We will ask the question.

Senator METZENBAUM. Ask the question, belonging to a club that discriminates.

Mr. LAFITTE. I normally do, Senator.

Mr. LANE. In this particular case, if I might add, his questionnaire showed that he was formerly a member of that club. And from my own personal knowledge, I know that there has been a battle going on within the club on that very question. And there are some members that feel that they should stay in that club and continue the fight to open it up.

Senator METZENBAUM. Did you check to see if Judge Scalia was involved in the fight?

Mr. LANE. No, I did not.

Senator METZENBAUM. And is it not the fact that he did not resign until December 1985?

Mr. LANE. I do not know the date.

Senator METZENBAUM. He was there about 5 or 6 years, as I recollect.

Thank you, Mr. Chairman.

The CHAIRMAN. I want to ask you this: I have before me the American Bar Association Standing Committee on the Federal Judiciary, what it is and how it works.

And on appointments to the Supreme Court, I want to quote here. Evaluation criterion ratings.

The committee's investigation of prospective nominees to the Supreme Court is limited to their professional qualifications, their professional competence, judicial temperament, and integrity.

So, I had never heard of the American Bar making a detailed investigation of everything about a nominee. And I was always under the impression it was just what you got in this book here.

Is it true your investigation is limited to the professional competence?

Mr. FISKE. That is correct, Senator.

The CHAIRMAN. What ability they have as a lawyer, their professional competence, their judicial temperament, whether or not they possess the personality and temperament to be a fair and a reasonable and a just judge; and integrity, as to their honesty, their lack of corruptness, their character.

Is that the basis of your investigation, what I just stated?

Mr. FISKE. Yes; it is, Senator. And as I indicated before, that is what I believe what we tried to make clear in the second paragraph of our letter to you, regarding——

The CHAIRMAN. These questions about all these little details—as I understand it, you do not investigate all those. That is the FBI's job and the Judiciary Committee's job, is it not? Is that the way you construe it?

Mr. FISKE. Well, there certainly are matters, Senator, that we feel the FBI is more able to investigate than we are. And there are other matters where you have the subpoena power and can place people under oath.

The CHAIRMAN. Of course, if you picked up anything detrimental, you would report it. But as I mentioned, those are the qualifications that a professional organization, as I understand, would be interested in presenting to the committee.

Other details would be gone into by the administration, the FBI, the Judiciary Committee in the Senate.

Is that your understanding?

Mr. FISKE. Yes, we recognize, Senator, that our function is, principal function is, professional competence, integrity and temperament. And we certainly recognize that there are matters which the FBI and this committee are better equipped to investigate than we are.

The CHAIRMAN. Three things: Professional competence, judicial temperament, and integrity?

Mr. FISKE. Yes, sir.

The CHAIRMAN. The distinguished Senator from Iowa?

Senator GRASSLEY. Mr. Chairman, I have no questions of this panel.

The CHAIRMAN. Distinguished Senator from Maryland.

Senator MATHIAS. Thank you, Mr Chairman.

I would just like to thank the members of the American Bar Association for their continuing interest and help to this committee.

Mr. FISKE. Thank you, Senator.

The CHAIRMAN. The distinguished Senator from Vermont?

Senator LEAHY. I have no questions of this panel, Mr. Chairman. I have read their report. The questions that I would ask them are in their report. Other questions would go outside their report, and they would not be the ones to ask the questions of.

Senator KENNEDY. I would just submit a question——

The CHAIRMAN. Well, let me see. Are you through, you say?

Senator LEAHY. Yes.

Senator KENNEDY. I would just submit it for a written response, if that is all right? Can I just submit a question?

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. I will just submit a question for writing—I will just submit a written question if I could. I would like to clear up a factual issue in question that I would like to get straightened out for the record.

I will submit it so that we can move on, Mr. Chairman.

The CHAIRMAN. As I understand—now everybody has asked questions. Are you through?

As I understand, the committee investigation included interviews with Justices of the U.S. Supreme Court, other Federal and State judges, practicing attorneys, deans and faculty members of law schools, a review of their opinions, and then two members of your committee interviewed Judge Scalia personally, I believe.

Mr. FISKE. Yes, sir.

The CHAIRMAN. And as to the judges, you say many judges who do not personally know Judge Scalia have a favorable impression of him based on his reputation and by reading the opinions that he has written.

The judicial community was strong in its praise of Judge Scalia's qualifications. The judicial community. Is that correct?

Mr. FISKE. Yes; it is, Senator.

The CHAIRMAN. That is an excerpt here that I had.

Now, you interviewed lawyers. Lawyers have commented that he is always well prepared. He asks the right questions and writes exceedingly well. Arguing before Judge Scalia is an exhilarating experience. That he has strong intellectual capabilities. That he is very fair. And that he has a warm and friendly personality. That is an excerpt. Is that correct?

Mr. FISKE. That is correct, Senator.

The CHAIRMAN. Deans and professors of law, including specialists in constitutional law and scholars of the Supreme Court, he is uniformly praised by those who know him for his ability, writing skills, and keen intellect; is that correct?

Mr. FISKE. Yes, Senator.

The CHAIRMAN. Now, a survey of his opinions. High praise for his intellectual capacity, his powers of expression, his ability to analyze complex legal issues, and his organization and articulation of ideas. He is regarded as a splendid legal writer; is that correct?

Mr. FISKE. Yes; it is.

The CHAIRMAN. In the statement I believe you made and gave out from your letter to the press is a short summary.

To summarize our findings, Judge Scalia had an outstanding academic record, and has demonstrated strong abilities in his service as a practicing lawyer, a teacher of law, as an appellate judge.

Our investigation has shown him to be extremely intelligent, analytical, thorough, hard working, and devoted to the legal profession. His writing and analytical skills are widely acclaimed. The diversity of his experience as a practicing lawyer, as a law teacher in four of the outstanding law schools of this country, and as a Federal appellate judge, provides a valuable background for a Justice of the Supreme Court.

Notwithstanding isolated expressions of concern, our investigation revealed that Judge Scalia has an outstanding judicial temperament, and that he is well suited for service on the Supreme Court from that standpoint. He enjoys the respect of his colleagues both on and off the bench for the soundness of his judgment and his congeniality.

His integrity is above reproach.

In conclusion, the committee, by a unanimous vote, has found Judge Scalia to be well qualified to serve as an Associate Justice of the Supreme Court of the United States.

Is that correct?

Mr. FISKE. Yes; it is, Senator.

The CHAIRMAN. And that is your recommendation?

Mr. FISKE. Yes; it is, Senator.

The CHAIRMAN. That is your finding?

Mr. FISKE. Yes, sir.

The CHAIRMAN. You stand by it now, all of you?

Mr. FISKE. Yes; we do.

Mr. LAFITTE. Yes.

Mr. LANE. Yes, sir.

The CHAIRMAN. No more questions. You are now excused. Thank you for your appearance.

[Prepared statement follows:]

STATEMENT

OF

ROBERT B. FISKE, JR.

Mr. Chairman and Members of the Committee:

My name is Robert B. Fiske, Jr. I practice law in New York City, and I am chairman of the American Bar Association's Standing Committee on Federal Judiciary. With me today are two other members of our committee, John D. Lane of Washington, D.C., and Gene W. Lafitte of New Orleans, Louisiana. We appear today to present the views of the American Bar Association on the nomination of the Honorable Antonin Scalia of Washington, D.C., to be an Associate Justice of the Supreme Court of the United States.

At the request of the Attorney General, our committee investigated the professional competence, judicial temperament and integrity of Judge Scalia. Our work included discussions with more than 340 persons, including (a) the Justices of the Supreme Court of the United States and many other federal and state judges across the country; (b) a national cross section of practicing lawyers; and (c) a number of law school deans and faculty members, some of whom are specialists in constitutional law and scholars of the Supreme Court. In addition, we have had Judge Scalia's opinions reviewed by a team comprised of the Dean and law professors from the University of Michigan Law School, by a separate team of practicing lawyers, and by three law students. Finally, two members of our committee interviewed Judge Scalia.

Based on our investigation the committee is unanimously of the opinion that Judge Scalia is entitled to the committee's highest evaluation of a nominee to the Supreme

Court -- "Well Qualified." That evaluation is reserved for those who meet the highest standards of professional competence, judicial temperament and integrity. Persons in this category must be among the best available for appointment to the Supreme Court.

I have filed with this Committee a letter describing the results of our investigation, and shall not repeat those results in detail here. I request that the letter be included in the record of these hearings.

To summarize our findings, Judge Scalia has an outstanding academic record, and has demonstrated strong abilities in his service as a practicing lawyer, a teacher of law, and as an appellate judge. Our investigation has shown him to be extremely intelligent, analytical, thorough, hard-working, and devoted to the legal profession. His writing and analytical skills are widely acclaimed. The diversity of his experience as a practicing lawyer, as a law teacher in four of the outstanding law schools of this country, and as a federal appellate judge provides a valuable background for a justice of the Supreme Court.

Notwithstanding isolated expressions of concern, our investigation revealed that Judge Scalia has an outstanding judicial temperament, and that he is well suited for service on the Supreme Court from that standpoint. He enjoys the respect of his colleagues both on and off the bench for the soundness of his judgment and his congeniality. His integrity is above reproach.

In conclusion, the committee by unanimous vote has found Judge Scalia to be "Well Qualified" to serve as an Associate Justice of the Supreme Court of the United States.

The **Chairman**. Our first panel this morning, and if they will please come to the table: Ms. Carla Hills, of the firm of Latham, Watkin & Hills of Washington; dean Gerhard Casper, dean of the University of Chicago School of Law, Chicago, IL; Dean Paul Verkuil, president of the College of William & Mary. If you will come in that order and sit in that same order. Also, Mr. Lloyd Cutler, Wilmer, Cutler & Pickering, Washington, DC. How about Erwin Griswold, is he here? If you will sit in that seat right there, Mr. Griswold.

Now, we are going to give you 3 minutes apiece to express yourselves. If you can do it in less time, that will be fine; but you can take 3 minutes.

Now, if you have got written statements, if you wish to put it in the record, we will put the entire statement in the record.

But first, I will swear you. If you will stand up and hold up your right hand.

Will the testimony given to this Chair be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. **Hills**. It will.

Mr. **Casper**. It will.

Mr. **Verkuil**. It will.

Mr. **Cutler**. It will.

Mr. **Griswold**. It will.

The **Chairman**. Have a seat

Ms. Hills, you may proceed.

TESTIMONY OF A PANEL CONSISTING OF CARLA HILLS, LATHAM, WATKINS & HILLS, WASHINGTON, DC; GERHARD CASPER, DEAN, SCHOOL OF LAW, UNIVERSITY OF CHICAGO, CHICAGO, IL; PAUL VERKUIL, PRESIDENT AND PROFESSOR OF LAW, COLLEGE OF WILLIAM AND MARY, WILLIAMSBURG, VA; LLOYD CUTLER, WILMER, CUTLER & PICKERING, WASHINGTON, DC; AND ERWIN GRISWOLD, WASHINGTON, DC

Ms. **Hills**. Thank you, Mr. Chairman.

Mr. Chairman, and the distinguished members of this committee: I have worked with, known, admired, and been enriched by the wisdom of Judge Scalia since 1972. He was then chair of the Administrative Conference of the United States, and I was just named to that body.

One cannot imagine a wider group of Federal issues than those addressed by the conference, or a wider divergence of views than those held by its members.

Within intellectual precision, unfailing humor, and relentless fairness Judge Scalia accommodated all opinion and faithfully caused our deliberations to be well recorded.

He was at all times constructive in helping that body build a consensus even when it did not reflect his own judgment.

When I went to lead the Civil Division of the Justice Department in March 1974, I was pleased to learn that my colleagues there held him in the same high regard as did I, a regard that increased when he came to head the Office of Legal Counsel later that year.

Those were difficult days that we shared through the first months of President Ford's administration. Seldom, if ever, have so many complex and emotional legal issues been so prominent and so controversial.

Yet during that period, and in the years following, when I sought his counsel, from the Department of Housing and Urban Development, he was ever the patient, careful and reasonable adviser.

In writing and by voice, formally and informally, he expressed his view on a wide range of issues, issues often of profound constitutional importance. Never did I perceive or hear an allusion to his having a bias or a leaning. He was respected for his objectivity, clarity, judgment and integrity.

In my view, the Senate has now a rare opportunity to celebrate our Supreme Court by its confirmation of Judge Scalia's appointment to that institution.

The essence of our legal system is its ability to provide a government that rules by law rather than by individual. The fairness of that system depends on the intellectual soundness and, thus, predictability of opinions that emanate from the Supreme Court.

However wise the Justices might be judged on the basis of any number of standards, the acceptance of their ruling by our body politic depends on how the public perceives the Court's work over the course of years. Inarticulate or fragmented decisions serve no purpose; well-reasoned opinions that bind the Court and set forth lucid rationales will serve all of us quite well indeed.

Judge Scalia brings distinction and respect to this Court. His ability to reason, write, and persuade is his hallmark.

That he will do this, all of this, with energy and good humor makes it a happy privilege for me to appear here in support of his confirmation.

The CHAIRMAN. Thank you very much. Dean Casper, we are glad to hear from you.

STATEMENT OF GERHARD CASPER

Mr. CASPER. Mr. Chairman and members of the committee, my name is Gerhard Casper, and I am the dean of the University of Chicago Law School. I am, of course, not appearing before you in my capacity as dean. I am referring to that role only because it made me for 4 years what FBI investigators like to call the nominee's supervisor; though God knows that there are few jobs more challenging than the task of supervising the University of Chicago Law School faculty.

I am well familiar with Judge Scalia's academic work and reasonably familiar with his judicial work. Judge Scalia possesses what I would call a tenacious intellect. He is intellectually refined and takes great pleasure in measuring a problem.

To put it differently: He is exceptionally probing in his investigation of legal matters. He is thoughtful and straightforward.

Of course, Judge Scalia is not a mere technician. He understands fully the intellectual, moral and practical difficulties inherent in most controversial legal issues. The best example from Judge Scalia's writings to illustrate my point is his article on judicial review of administration action in the 1978 Supreme Court Review, of which, incidentally, I am an editor. His article on the Supreme Court decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural*

Resources Defense Council is a masterful and sweeping critique of the D.C. Circuit, the Supreme Court, and Congress failure to update the Administrative Procedure Act.

In recent weeks, I have often been asked what Judge Scalia's ideology is. I have noticed that the distinguished members of this committee also use the term ideology with great frequency. I am frankly not sure what everybody means when they say ideology.

For instance, President Reagan a few weeks ago seemed to employ the term mainly to criticize the opponents of the Manion nomination.

If you ask me what Judge Scalia's view of the Constitution and the rule of law is, I am inclined to answer that he believes that the Constitution and the laws mean what they say, and that it is not beyond human endeavor to determine the meaning of what they say. If you call that ideology, so be it.

I do not mean to suggest that, in my opinion, Judge Scalia is invariably right. I have had many disagreements with him. For instance, on the constitutionality of the legislative veto. But there is no question in my mind that Judge Scalia at all times attempts to be faithful to what we may call the American concept of the rule of law.

Permit me to say a word about how to evaluate judges. There was a time not too long ago when it was considered respectable and valuable for lawyers to sit down and do a painstaking, detailed analysis of a judge's single decision, keeping in mind the dictum of one of the great State judges of all time, former Justice Schaefer of the Illinois Supreme Court who died earlier this year.

The principal stimulus, Justice Schaefer said, comes from the facts of the case. The interaction between fact and law is close and continuous.

Without having studied the subject empirically, I have a sense that this genre of analysis is increasingly disfavored. Its place seems to be taken by more speculative endeavors which seem less interested in understanding the judge than in the approval or disapproval of outcomes.

In this world view, the courts are filled with heroes and villains rather than with professionals to whose professional performance we apply professional standards.

The CHAIRMAN. Your time is up. I have got a red light there.

Mr. CASPER. May I just give you my punch line, Mr. Chairman? If one applies professional standards to Judge Scalia's case, one must confirm this splendid nomination.

Thank you.

The CHAIRMAN. Thank you very much. We appreciate your appearance.

Mr. Verkuil, how do you pronounce that?

Mr. VERKUIL. Mr. Chairman, it is Verkuil. Thank you for inquiring.

The CHAIRMAN. You are from the College of William and Mary. You are also a professor of law, are you?

Mr. VERKUIL. I am president and professor of law at the College of William and Mary.

The CHAIRMAN. Double duty.

Mr. VERKUIL. Well, I guess you might say that.

The CHAIRMAN. Do you get extra pay for that?

Mr. VERKUIL. I will inquire about that, Senator. I have not separated them.

The CHAIRMAN. You may proceed.

STATEMENT OF PAUL VERKUIL

Mr. VERKUIL. I am here, of course, in my individual capacity.

I would first like to say I am not here to testify in a partisan role or as one who necessarily shares the same views as Judge Scalia on legal issues. I am here to testify about why I believe he will make an outstanding Justice.

I shall emphasize two aspects of his background that bear upon his qualifications for the high post he seeks: his judicial temperament and his legal and scholarly qualifications. Temperament is not easy to describe or predict, but it is the best way I know to get at the quality of fairness that is essential to the judicial role.

My focus is upon Judge Scalia's openmindedness and willingness to engage in legal debate; what I might call his exuberant argumentativeness. These qualities translate into fairmindedness. I first had an opportunity to know Judge Scalia as a professional colleague 15 years ago when he was chairman of the Administrative Conference of the United States and I was a consultant to that organization.

From the outset our professional relationship was marked by a good-humored exchange of views. The first issue I recall debating in depth was the role of the courts on judicial review of informal agency rulemaking. This issue—that is, determining the proper relationship between the courts and agency in the promulgation of rules—has occupied the courts for years. I found Judge Scalia to be a thoughtful, persistent, and insightful student of the law. The article and Conference recommendation that came out of these efforts was much in debt to his efforts.

Later I had the opportunity to work with Judge Scalia on the Administrative Law Section of the American Bar Association during the period he was chairman. Here he not only demonstrated his usual astuteness on the issues, but he displayed a remarkable ability to distill and integrate widely differing views into effective statements of position. In fact, I have never seen a better coalition builder than Scalia. He uses his charm, humor, and intellect, frequently in that order, to bring people to a common position. This quality is indicative of a temperament that will, and I am sure does, serve the judiciary well. It also speaks to his likely success as a Justice on the High Court.

My most extended exposure to Judge Scalia was during the summer of 1984 when we both participated in the Anglo-American Legal Exchange at the invitation of the Chief Justice of the United States. This program dealt with the role of judicial review of administrative action in England and the United States, and involved a visit by a group of eight American lawyers and judges with a like group in the United Kingdom. Judge Scalia led many of the discussion groups and did so in an informed and entertaining manner that made him a favorite of the British team as well as our own.

To a country that is embarking on a more active period of judicial review over administrative action, he offered some sobering words of caution, yet in a manner that rallied many to his side. The ability to build a case, defend it, and where the occasion demands, abandon it is his in substantial measure.

Senator, I see my time is up. I am going to let you refer to my written testimony for his scholarly works which I have commented upon, and I would only conclude that I hope this Justice meets your standards, the demanding standards of the committee and the Senate.

Thank you.

The CHAIRMAN. Thank you very much. You have asked that your statement be put in the record, and we will put it in.

Mr. VERKUIL. Thank you.

[Prepared statement follows:]

Testimony of Paul R. Verkuil
Before the Committee on the Judiciary,
United States Senate,
in support of the nomination
of Antonin Scalia
August 6, 1986

May it please the Committee:

I am president of the College of William and Mary and a Professor of Law. I hold an A.B. from William and Mary (1961) and an LL.B. from the University of Virginia (1967), where I served as an editor of the Law Review. After graduation I practiced law in New York City at the firms of Cravath, Swaine and Moore and Paul, Weiss, Rifkind, Wharton & Garrison. I was professor of law at the University of North Carolina from 1971 to 1978 and Dean of Law at Tulane University from 1978 to 1985. My field of legal specialization is administrative law and government regulation and I have published numerous articles and books on the subject, including Public Control of Business (1977) (with D. Boies), Administrative Law and Process (1985) (with R. Pierce and S. Shapiro) and Economic Regulation of Business (2d ed 1985) (with T. Morgan and J. Harrison).

I am not here to testify in a partisan role or as one who necessarily shares the same views as Judge Scalia on most legal issues. I am here to testify about the person I know as Nino Scalia and why I believe he will make an outstanding Justice. I shall emphasize two aspects of his background that bear upon his qualifications for the high post he seeks: his judicial temperament and his legal and scholarly qualifications. Temperament is not easy to describe or predict but it is the best way I know to get at the quality of fairness that is essential to the judicial role. My focus is upon Judge Scalia's open mindedness and willingness to engage in legal debate; what might be called his exuberant argumentativeness. These qualities translate into fairmindedness. I first had an opportunity to know Judge Scalia as a professional colleague 15 years ago when he was Chairman of the Administrative Conference of the United States and I was a consultant to that organization. From the outset our professional relationship was marked by a good humored exchange of views. The first issue I recall debating in depth was the role of the courts on judicial review of informal agency rulemaking. This issue, i.e., determining the proper relationship between the courts and agency in the promulgation of rules, has occupied the courts for years. I found Judge Scalia to be a thoughtful, persistent and insightful student of the law. The article and Conference recommendation that came out of these efforts was much in debt to his efforts. See Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185 (1973); ACUS Rec. 74-4.

Later I had the opportunity to work with Judge Scalia on the Administrative Law Section of the American Bar Association during the period he was chairman. Here he not only demonstrated his usual astuteness on the issues, but he also displayed a remarkable ability to distill and integrate widely differing views into effective statements of position. In fact I have never seen a better coalition builder than Scalia. He uses his charm, humor and intellect, frequently in that order, to bring people to a common position. This quality is indicative of a temperament that will and I'm sure does serve the judiciary well; it also speaks to his likely success as a justice on the high court.

My most recent extended exposure to Judge Scalia was during the summer of 1984 when we both participated in the Anglo-American Legal Exchange at the invitation of the Chief Justice of the United States. This program dealt with the role of judicial review of administrative action in England and the United States and involved a visit by a group of eight American lawyers and judges with a like group in the United Kingdom for two weeks there and a return visit to the United States. Judge Scalia lead many of the discussion groups and did so in an informed and entertaining manner that made him a favorite of the British team as well as his own. To a country that is embarking on a more active period of judicial review over administrative action, he offered some sobering words of caution, yet in a manner that rallied many to his side. The ability to build a case, defend it, and where occasion demands, abandon it is his in substantial measure.

On the scholarly front, Judge Scalia has built a solid reputation during his years in government and on the University of Virginia and Chicago law faculties. The articles I know best are "Procedural Aspects of the Consumer Product Safety Act," 20 U.C.L.A. L. Rev. 899 (1973) (co-authored with Frank Goodman), "Vermont Yankee: The APA, The D.C. Circuit and the Supreme Court," 1978 Sup. Ct. Rev. 345 (1978); and "The ALS Fiasco--A Reprise," 47 U. Chi. L. Rev. 57 (1979). In the first article he laid out a roadmap to understanding the complicated procedures established for the CPSC, especially as they related to judicial review; in the second article he took what was to become his own court to task for ignoring the clear message of the Supreme Court to desist from adding procedural requirements to agency rulemaking as part of the process of judicial review. In the third he dealt directly with a sensitive subject in the administrative process--the proper role and authority of administrative law judges. Judge Scalia was also instrumental in articulating the rationale for challenging the legislative veto in Chadha v. INS, a case he briefed amici curiae for the American Bar Association.

Much of his administrative law writing, including that which appeared while he edited Regulation magazine, has to do with restraining judicial oversight of agency action. This willingness to let the political process operate in the agency context comes across in his judicial opinions. For example, in Community Nutrition Institute v. Block, 698 F. 2d 1239, 1255 (D.C. Cir. 1983) his dissent on the question of consumer standing under the Agricultural Marketing Agreement Act formed the basis for Justice O'Connor's unanimous opinion in the Supreme Court 467 U.S. 340 (1984). In Chaney v. Heckler, 718 F. 2d 1174, 1192 (D.C. Cir. 1983) rev'd 105 S. Ct. 1649 (1985) his dissent formed the basis of the Court's decision to hold unreviewable an agency's decision not to prosecute. In Synar v. United States, 626 F. Supp 1374 (D.D.C. 1986), the Gramm-Rudman case with which this committee is surely familiar, Judge Scalia participated in the panel that decided the Congressional removal provisions of the Comptroller General were unconstitutional. That decision was upheld by the Supreme Court in Bowsher v. Synar on July 7, 1986. The panel's careful analysis of the leading precedent on removal (Humphrey's Executor v. United States) and its refusal to adopt the broader non-delegation argument of plaintiff has the mark of Scalia's approach--judicial intervention only so far as is necessary to vindicate separation of powers concerns.

This is likely to be a continuing theme for a judge who has reservations about judicial intervention. It is my firm belief, however, that while his views once formed are strongly held they are also consistent across whatever philosophical issue is presented. In this sense Judge Scalia has the makings of another John Marshall Harlan, a judge universally respected for his restraint during the Warren Court years. What strikes me as most relevant from his background with which I am familiar are his commitment to analysis, debate, argument and coalition building. These qualities are important because they suggest a willingness to hear the other side which is the essence of fairness. He has an exceptional talent for judging and I believe he will make a splendid Justice of the Supreme Court, should the Senate see fit to confirm him.

The **Chairman**. The Honorable Erwin Griswold. Dean Griswold, we are honored to have you here before us.

STATEMENT OF ERWIN GRISWOLD

Mr. **Griswold**. Mr. Chairman and members of the committee, I am Erwin Griswold, now a practicing lawyer here in Washington, having been a dean of the Harvard Law School and Solicitor General of the United States, and, I may add, by appointment of President Kennedy, a member of the Civil Rights Commission at a time when it was active and effective.

My first acquaintance with Judge Scalia was more than 25 years ago when he came to the Harvard Law School as a student. I cannot say that I have any memory of him during the first year, but at the end of the first year, he achieved a distinguished record in the very top range of the class. And I did observe him and see him during the next 2 years.

He became a member of the board of the Harvard Law Review and at the end of his second year became note editor of the Law Review, a post which he filled during his third year at school. He received his degree magna cum laude, which meant that he had an A average throughout his work at the law school.

The year following his graduation he spent as a Sheldon Traveling Fellow abroad, and I was a member of the university committee which recommended him to the Harvard Corp. for that appointment.

The next 6 years he spent in private practice in the firm of Jones, Day, Cockley & Reavis in Cleveland. I am now a partner in that firm, but I had no connection with it at the time. This was, however, one thing that occurred to me, and I made some inquiries of why did Scalia leave the firm after 6 years. Was it because it had been intimated to him that he probably was not going to become a partner? I asked a couple of my present partners who were members of the firm at the time, and they said, on the contrary, he was doing very well, he was very highly regarded. He would have soon become a partner, but he found that his interests were broader and he had an urge to teach and he deliberately made the choice himself to move to teaching.

He then went to the University of Virginia Law School. Then he was in Washington as chairman of the Administrative Conference where I saw him on various occasions. Later he became Assistant Attorney General for the Office of Legal Counsel. I not only observed his work there, and it was an office I was familiar with, but I had contact with him where I found that he was tough minded, but fair.

After that, he went to the University of Chicago, wrote Law Review articles, and the past few years has been a judge writing opinions which I have observed. I regard him as a person of top legal quality with a broad mind, great intellectual integrity, and very well qualified to be a Justice of the Supreme Court.

I hope this committee will recommend that he be confirmed.

The **Chairman**. Dean Griswold, thank you very much for your appearance.

Mr. Cutler, we will be glad to hear from you.

STATEMENT OF LLOYD N. CUTLER

Mr. CUTLER. Mr. Chairman, I have also filed a written statement, and I will summarize it only briefly.

When I was counsel to President Carter, unfortunately he never had an opportunity to nominate a Justice to the Supreme Court. If such an opportunity had arisen, I probably would not have recommended that he appoint Judge Scalia, even though at that time he was a distinguished professor of law.

The CHAIRMAN. Speak a little louder. We can hardly hear you.

Mr. CUTLER. Yes, sir.

In the unlikely event that I was serving as counsel for President Reagan, I would certainly have included Judge Scalia among the three or four most qualified people in the country for the post.

I make that point because I believe it draws the right distinction between a President's role in nominating a Supreme Court Justice, and the Senate's role in deciding whether to grant its advice and consent.

Since Supreme Court vacancies occur so infrequently, the President has ample reason to select a well-qualified nominee whose broad political and legal philosophy the President believes to be consistent with his own. The President, of course, may be disappointed in the event, as was true of President Teddy Roosevelt in the case of Justice Holmes, and we understand President Eisenhower in the case of Chief Justice Warren and Justice Brennan.

But as the appointing authority, the President certainly has the right to take compatibility of philosophy into account.

The Senate, in contrast, does not play the affirmative role of selecting the nominee, but the negative role of withholding its consent to an improper appointment.

What is an improper appointment? In my view, it is improper to nominate someone who is not professionally qualified, no matter how compatible his views may be with the President. I also believe it is improper to nominate someone, however well qualified professionally, whose ideology so dominates his judicial judgment as to put his impartiality in particular cases into question.

Measured by those standards, it seems to me that the nomination of Judge Scalia is clearly a proper one. You have heard his academic and professional qualifications, and they are certainly very impressive. As for his political and judicial philosophy, I find from reading his opinions that he is nearer the center than the extreme on the major issues that arise in our political and legal system.

Perhaps the best evidence of that is his record on the court of appeals. So far as I can determine, his major opinions on that court have been supported as frequently by what are colloquially called the liberal wing of the court as by the conservative wing. In one recent libel case involving important first amendment values, he was one of five outspoken dissenters, along with four members of the liberal wing. And in the recent Gramm-Rudman opinion—which I did not like on other grounds—his view was sustained by a Supreme Court majority that included three of the so-called liberal members of that Court.

Finally, he possesses a special quality that can never be in oversupply on the Supreme Court, and that is an enthusiasm for appellate argument, a joy in the tough question and the persuasive answer, and an openness about his own State of mind that are of great help to the advocates in the case and to the journalists and scholars who study the work of the Court.

[Prepared statement of Mr. Cutler follows:]

Statement of Lloyd N. Cutler
Before the Committee on the Judiciary, United States Senate, on the Nomination of the Honorable Antonin Scalia to be An Associate Justice of the Supreme Court of the United States

At Judge Scalia's request, I am here to present my views concerning his nomination as an Associate Justice of the Supreme Court of the United States.

As some members of this Committee are aware, my political leanings and legal philosophy are a considerable distance from those of the conservative or neo-conservative school. I am neither a confidant nor, on many issues, a supporter of this administration. In the Nixon administration I was ranked Number 13 on the White House enemies list. But based on my professional knowledge of Judge Scalia over the past 20 years, and a close reading of his major court of appeals decisions, I believe he is very well qualified to serve on our highest court, and I urge the Senate to advise and consent to his appointment.

In my former capacity as Counsel to President Carter, I advised him on many judicial appointments. Unfortunately, President Carter was one of the few full term Presidents who never had an opportunity to nominate a Justice of the Supreme Court. If such an opportunity had arisen, I probably would not have urged the nomination of Judge Scalia, even though he was at that time a very distinguished professor of law. But in the unlikely event I were now serving as counsel to President Reagan, I would certainly have included Judge Scalia among the three or four most qualified persons to consider for the present vacancy.

I make this point because I believe it draws the right distinction between a President's role in nominating a Supreme Court Justice and the Senate's role in deciding whether to grant its advice and consent. Since Supreme Court vacancies occur so infrequently, a President has ample reason to select a well-qualified nominee whose broad political and legal philosophy the President believes to be generally consistent with his own. The President may be disappointed in the event, as were the Presidents who appointed Justice Holmes, Chief Justice Warren and Justice Brennan. But as the appointing authority, the President has the right to take the compatibility of the nominee's broad philosophy into account. The Senate, in contrast, does not play the affirmative role of selecting the nominee, but the negative one of withholding its consent to an improper appointment.

What is an improper appointment? In my view it is improper to nominate someone who is plainly not professionally qualified, however compatible his broad philosophy may be with the President's. I publicly opposed the most recent nominee to the Seventh Circuit on that ground, and I agree with those Senators who voted against him. I also believe it improper to nominate someone, however well qualified professionally, whose ideology so dominates his judicial judgment as to place his impartiality in particular cases into question. For example, anyone who creates a public perception that he would decide all cases involving claimed minority rights for or against that minority does not belong on the Supreme Court or any other federal court.

Measured by these standards it seems to me that the nomination of Judge Scalia is clearly a proper one. His academic and professional credentials are most impressive. In private life, he was an honor graduate of our second best law school, an editor of its law review, an able practising attorney and a distinguished professor of law. In public life, he has served as Chairman of the Administrative Conference of the United States, as Assistant Attorney General in charge of the Office of Legal Counsel, and as a judge of the Court of Appeals for the District of Columbia Circuit.

Turning to his political and judicial philosophy, I find Judge Scalia to be nearer the center than the extremes on the major issues that arise in our political and legal system. While he is a perceptive critic of overregulation, his administrative law decisions have broadly construed agency powers and congressional intent. While he has spoken out as a law professor against the judicial rationalizations for upholding affirmative action, he has never questioned the objectives of the civil rights laws or their constitutional underpinnings. And while he has strongly defended the executive power against congressional interference, he has upheld broad congressional delegations of legislative power to the executive and independent agencies.

Perhaps the best evidence of whether Judge Scalia is out of tune with the main stream of contemporary judicial thought is his record on the Court of Appeals. So far as I can determine, his major opinions on that court have been supported about as frequently by what is colloquially called the "liberal" wing of that court (including President Carter's four appointees) as by the "conservative" wing. In one recent libel case involving important First Amendment issues, he was one of five outspoken dissenters, along with four from the liberal wing.1/ And his recent Gramm-Rudman opinion was sustained, despite my own arguments to the contrary, by a Supreme Court majority that included three of the Justices generally classified as among the liberal members of the Court.

Finally, Judge Scalia possesses a special quality that can never be in oversupply on the Supreme Court. He has an enthusiasm for appellate argument, a joy in the tough question and the persuasive answer, and an openness about his own state of mind that are a great help to the advocates in the case and to the journalists and scholars who study the work of the Court. I suspect that he shows the same quality in his conferences with his colleagues, and it is certainly manifest in his judicial opinions. If confirmed, he will add a sparkle to the Supreme Court's proceedings that should enhance its role as the most remarkable and important judicial tribunal in the world today.

1/ Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984).

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. I have no questions.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. Mr. Chairman, I cannot imagine a more distinguished panel to render an opinion on an appointment to the Supreme Court. I want to thank each of them for being with us.

I really have very few questions, but this thought does occur. In Judge Scalia's judicial experience, he has had relatively few criminal cases. The District of Columbia Circuit simply does not generate a lot of criminal work.

Do you have any thoughts as to whether that is a limitation in his experience? Do you have any thoughts in general on the breadth of his legal experience and his judicial experience?

The CHAIRMAN. Any of you care to answer that?

Mr. CASPER. Senator Mathias, may I perhaps as a point of personal privilege, first of all, say how much I regret that you will retire from the Senate and from this committee. You have been one of the most enlightened forces in debates on law and constitutional questions. I am deeply regretful that you leave. I cannot believe that you will enjoy what you will do afterwards, but I hope you will.

Senator MATHIAS. I thank you for those kind words and also thank you for the assistance that you have given very generously and spontaneously over these many years.

Mr. CASPER. Thank you, Senator.

Senator, I think while it may be true that Judge Scalia has not had much exposure to criminal law on this circuit, it is also true that the Supreme Court's exposure to criminal law is of a peculiar kind.

Almost all the criminal law cases the Supreme Court takes, are those which involve large constitutional questions. The Supreme Court, after all, does not frequently sit as a court of last resort and review in criminal cases. It will take mostly the cases which matter in terms of constitutional interpretation and there especially those concerning criminal procedure.

I have really no question that Judge Scalia is well qualified to deal with those issues.

Senator MATHIAS. One other question, Mr. Chairman, I might put to Dean Griswold. Present Reagan has appointed an unusually large number of law professors to the courts of appeals in the last few years. This is the first law professor to go to the Supreme Court since Justice Frankfurter.

Does this have any significance for the law faculties of the country?

Mr. GRISWOLD. No, I do not think so. It still remains an outside chance, although, of course, Justice Stone--later Chief Justice Stone—was a dean of the Columbia Law School before he became Attorney General. Other Presidents have appointed a good many professors to the courts of appeals, less often to the district courts because the professors usually have not had trial experience.

But I remember in particular Judge Calvert Magruder, who was Chief Judge of the first circuit for many years and surely one of the distinguished judges of his time.

I do not think that on the whole——

Senator MATHIAS. He had the good fortune to have Maryland roots and to live in Massachusetts.

Mr. CUTLER. Senator Mathias, not having attended the great law school in Massachusetts, I urge you not to overlook for the record Justice Douglas of Yale who survived well after Justice Frankfurter.

Senator MATHIAS. I stand corrected.

Mr. VERKUIL. Senator, I might just add that one effect it will have upon the law professors of America is that they will be sending their articles to Justice Scalia in the hopes that they will be cited by the Supreme Court.

Senator MATHIAS. All right. At any rate you think this will generate economic interest?

Mr. GRISWOLD. Yes.

Mr. VERKUIL. Yes.

Senator MATHIAS. Once again, I thank this panel very much for their help to the committee.

The CHAIRMAN. And as I look at this panel this morning, I do not know that there has been a more prestigious group of people, five people, sitting at one table, since I have been in the Senate. Every one of you have outstanding reputations, professional competence, judicial temperaments, and integrity. You would all make good members of the Supreme Court yourselves.

And I want to thank you for coming here, and taking the time.

The distinguished Senator from Arizona.

Senator DECONCINI. Mr. Chairman, thank you, and I echo those accolades for this panel, and I thank them for taking the time here.

I have great envy for those of you who have had an opportunity to know and work with Judge Scalia. I have not. I know him by reputation.

I do not know if you observed any of his testimony here yesterday, but he was probably one of the most evasive nominees I have ever seen. He was far more evasive than Justice Rehnquist, Mrs. O'Connor, or any other nominees that I have asked questions of. His evasiveness caught me somewhat by surprise. Dean Casper, in your statement you indicate that you and other lawyers have analyzed his cases. After this process that you have gone through and knowing him yourself, you can judge how open and direct he is. You can judge if he is nonevasive and "decides it the way it is before him," whatever that comes down to.

I asked him a question on the 14th amendment due process clause. I did not ask him how he was going to rule. I just asked him if he agreed with Justice Rehnquist that there was more than one standard, and he just said, "I can't say. I can't do it."

I then asked him a question on an article in a magazine that he was quoted in in 1982, regarding the Freedom of Information Act, which stated—and I will just read it quickly—"The defects of the Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth. The first line of defense against an arbitrary executive is do-it-yourself oversight by the public, and its surrogates, the press." End of quote.

I merely asked Judge Scalia did he stand by that today. And he said, "Well, I don't know." And I just have great envy for those of you who know him, because I am extremely disappointed. I indicated I—and I probably will vote for him because of his fine reputation. But maybe you can share with me any of those feelings that you think are just hearsay, if that is all they are, of opinions of how you think he would look at at the 14th amendment. I could not find out from him. I have no idea whether or not he agrees with Justice Rehnquist or does not, or has an opinion of his own, without asking him how to rule.

Maybe, Mr. Casper, you have a comment?

Mr. **Casper**. Well, Senator DeConcini, I had no opportunity to observe the testimony yesterday. I would just assume that if Judge Scalia was evasive, that he displayed good judgment. It shows what a judicious man he is, in not committing himself too far before your committee, and in particular not as concerns matters which could come before the Court.

Let me say a word about a matter which came up earlier this morning in the testimony of the ABA and in the questioning from Senators, and then respond to another part of your question, Senator DeConcini.

It was often asked this morning whether Judge Scalia was openminded. Well, I am not so sure whether I am openminded. When you listen to the questioning here this morning, you sometimes had the impression that to possess a mind, which is like a sieve, is a virtue. I am not sure it is a virtue.

Obviously, a man of 50 years of age, a law professor, has opinions, and has a framework of analysis. These are limitations on the openmindedness of all of us. Certainly that is true for me. However, there is something very important.

Antonin Scalia was a law professor, and he was a very good law professor. Good law professors know that they are bound to standards of verification, standards of validation.

When I had arguments with my colleague, Professor Scalia, he most certainly could see when the strength of the argument was on my side rather than on his side. That is very important.

Senator **DeConcini**. Well, excuse me, Dean Casper. I agree with that. What I guess I am asking, and it certainly was not clear in my observation, first, is that knowing the process of this committee, of what we go through, don't you believe we are entitled to ask him opinions as to what he thinks about the Constitution, without pinning him down—one member asked him how he would vote on *Roe* v. *Wade*.

Well, obviously he cannot and should not comment. But refusing to give us an opinion, or any idea of how he delves into the Constitution, I was extremely disappointed.

And that is why I ask some of you, you know him—you are not in the same boat—but it would be helpful to this Senator, if I had any idea of how he thinks about the Freedom of Information Act, other than a 1982 article.

And I could not get that, and you know him and I do not, and that is my quandry.

Mr. **Casper**. Senator, let me respond to that. I do think, of course, that this committee has the right to ask any and every question it wants to ask, as I do indeed believe that its power to consent is plenary.

With respect to the difficulty Judge Scalia is in, there is no controversial issue which you might want to ask about no matter of constitutional law, which will not potentially come before the Court, and so at this point he has to be very reserved.

That was the bad news. But now comes the good news. The good news is that in the case of academics, you are much better off than in the case of most other people.

There are writings. They have a record, a rather elaborate record most of the time, as does Judge Scalia, and while I have not recently discussed his views on the Freedom of Information Act with him, I would rather assume that—it is a good and strong hunch—that if you want to know Scalia's views on the Freedom of Information Act, his article pretty much represents those views, unless of course they become strongly challenged——

Senator DECONCINI. Then why could he not just say so? Professor Griswold, would you have a comment?

Mr. GRISWOLD. Yes. I would like to venture an answer to the question. In the first place, I think this is an extremely delicate and difficult situation——

Senator DECONCINI. I agree.

Mr. GRISWOLD [continuing]. With respect to the nominee. He must not say anything, which somebody else can interpret as a commitment of some kind or other, and even a question about the Freedom of Information Act, which is one of the areas almost sure to come before him at some time, is one in which I can see how it is very difficult.

Now I would like to recount some history. I think that until at least World War II, it was the practice of this committee, and the Senate, not to have any candidate for judicial office appear before the committee for that very reason.

In particular, it is my recollection, though historians can show me to be wrong, that Mr. Brandeis of Boston was not a witness before this committee during the long, drawn out hearings with respect to his nomination.

Other people appeared, other people on both sides, the question was explored very thoroughly, but it was not thought appropriate for the nominee to appear.

Some time after World War II, that changed. I recall that then Professor Frankfurter did appear before this committee with counsel. Dean Acheson was his counsel. And I think that a review of the hearings of that time will show that there were many questions which he thought that it was inappropriate for him to answer. I must say that within very wide limits, I regard it as a plus for Judge Scalia, that he takes a very careful and delicate view as to the range of questions which he feels it is appropriate for him to answer.

Senator DECONCINI. Thank you, Dean Griswold. My problem is, I guess, a little bit of knowledge is dangerous for some people and a little bit of experience may be the same way.

When we had Justice O'Connor here there were some questions she did not answer, but she gave us a personal opinion. She would give her opinion and qualify it, that it was not to be interpreted as an indication of how she would vote on the Bench on different constitutional questions, as did Mr. Rehnquist. Under the tremendous barrage that he had here of hostility from a few members, he responded to questions about the 14th amendment. Yes, he said that there were two different standards, one for race, and one for sex, based on his opinion. And that it is just a frustrating situation, when such an eminent jurist and an individual as Judge Scalia—and I do not degrade him at all by my comments here—was so unforthcoming. You give an explanation that I have great respect for because you know him, and I do not. And I have to very much rely on testimony, rather than hearing from him, and I would like to have had both. Thank you, Mr. Chairman.

The **Chairman**. The distinguished Senator from Iowa.

Senator **Grassley**. Mr. Chairman, I have a question for Mrs. Hills and Mr. Cutler, as they have served in the executive branch in recent years, and Judge Scalia seems to have strong views on the doctrine of separation of powers; it seems he tends to favor the executive branch on very close questions.

Do you two see anything out of balance, in Judge Scalia's views in this regard—separation of powers?

Ms. **Hills**. None whatsoever, Senator. I think Judge Scalia demonstrates great integrity of intellect and has addressed a large number of issues, as the dean aptly said, that there is no issue that you could think of that he has not written about in a rather prolific fashion, and I am not at all concerned about his jurisprudential approach.

Senator **Grassley**. Mr. Cutler.

Mr. **Cutler**. I happened to collaborate with then Professor Scalia in the preparation of the briefs in the legislative veto case, in which our position was upheld by the Supreme Court.

I was also one of the growing number of losing counsel before Judge Scalia in the *Gramm-Rudman* case. I disagreed as you might expect, like any good advocate, with the lower court opinion, but it is worth noting that in the Supreme Court opinion, as I mentioned, the majority included not only Justice Stevens and Justice Marshall, who happened to disagree with Judge Scalia on one ground of the opinion, but also Justice Brennan, who concurred fully in the opinion of the Chief Justice, which I would say concurred fully in the lower court per curiam opinion that I would bet a lunch was written by Judge Scalia.

Senator **Grassley**. Then I would ask all to respond to accusations, that perhaps maybe he is too rigid, too ideological.

Ms. **Hills**. Senator, my 15 years of experience working closely with Judge Scalia belies the accusation that he has a rigid mind. I heard the statement made by the representatives of the American Bar Association, preceding us, suggested that there were one or two comments, that he may have strong views, closely held.

But balance that suggestion against the fact that he is perhaps one of the best prepared judges on the appellate court here. It is very difficult to have studied the briefs, engaged in argument with your law clerks, and emerge without some view of the particular case with some precise questions.

He is overwhelmingly applauded at the bar, by lawyers who have appeared before him, for the excellence of his preparation, and for his ability to participate qualitatively in the discussion. So rigid he is not; intelligent, he very much is.

Mr. Cutler. I agree with what Ms. Hills has said as to Judge Scalia in particular. As to your hypothetical, I think yes, a nominee could be so ideologically convinced on a particular set of issues, that he would give the public perception of having his mind closed on cases that came before the Court.

The illustration I used in my written statement was, any nominee who gave the public perception that he would decide any case involving a claim of minority rights either always for, or always against, the minority group does not belong on the Supreme Court or any other Federal Court.

Senator **Grassley.** Anybody else?

Mr. Verkuil. Senator, I would just add also that I do personally think that ideological qualifications could be examined, and I would be uncomfortable at extreme ends.

This is certainly not that case, with this nominee, from my experience. I think he is a conservative person, but he is someone who practices judicial restraint and will do so, whatever the issue.

The *Synar* case is, in my view, a good example of that. He participated in the decision but did not strike the statute down by the much broader basis of nondelegation, which I think would have given this body much more difficulty, in a continuing sense. He was much more narrow in his view of how that separation of powers issue ought to have been resolved. I think that is the kind of approach he would take to legal issues generally, in the future, no matter what their political cast might be.

Mr. Casper. Senator, I agree with the other members of the panel. In my opening statement I criticized the use of the term ideological. I do not really know what it means. Ideology is usually what the other person has, and not what I have, and it is my opponent who is ideological while I am fairminded and oriented only toward the truth. Ideology, of course, in one meaning is a comprehensive world view, such as that of the Communist Party of the Soviet Union, or something like that. Its ideology.

The question is, what is Judge Scalia's view? I do not think he is ideological. I think he is deeply committed to constitutional government as it has developed up in the United States, and to his view of it. Now I disagree with some of his views on that matter, but he is definitely committed to the rule of law. Now that you can call an ideology of course. I would not.

Senator **Grassley.** Mr. Chairman, I yield back my time.

The **Chairman.** The distinguished Senator from Vermont.

Senator **Leahy.** Thank you, Mr. Chairman.

Mr. Chairman, like so many others, on both sides of the aisle, on this committee, I am supposed to be at another matter of Senate duties here on the Hill today, but I agree that this is such a prestigious and, in many ways, unique panel. Certainly one of the most prestigious ones I have seen in the various committees I sit on, and in the 12 years I have been here in the Senate.

And so, while I will owe apologies to those of my colleagues who wanted me to be at the other matter, I did not want to leave before I had a chance to hear each of them speak, and hear some of the questions and answers.

I have some of the same concerns expressed by Senator DeConcini on the question of the Freedom of Information Act. I had a long discussion, in my own questions of Judge Scalia, about that yesterday. I discussed it at great length with him in my office, back 2 or 3 weeks ago.

I am concerned because I think we are in era where the questions of first amendment, of freedom of the press, of the ability to look into what our Government is doing, and to determine when our Government makes mistakes, as well as when it does something right—all of these things I think are under more attack than at any time in my adult life.

I cannot think of a time when there were more forces, more individuals, and in fact, many people who know better attacking the ability of the press to go into stories in detail of people's rights of free speech, untrammeled speech, all the various first amendment matters. An attempt was made a couple years ago in the Congress to gut the Freedom of Information Act. That is only because a number of us were to stand up that were able to stop it.

So I think the questions asked by the distinguished Senator from Arizona were legitimate questions. I am concerned that they were not answered as fully as I think someone could without stepping over that line that a designee to a court cannot step over; that is, a line which requires him to give answers here to prejudging cases.

On the other hand, I do also, though, commend Judge Scalia for offering, in response to a question I asked, to recuse himself from a case coming up which also raises serious first amendment issues and one in which it was legitimate for him to recuse himself.

I might ask the panel, you obviously know Judge Scalia well, have analyzed his works, and know him. I would also assume that each of you have analyzed the statements, the cases and the positions of Justice Rehnquist at some length.

Do any of you see any significant ideological differences between Judge Scalia and Justice Rehnquist?

Mr. Cutler, I will be glad to start with you and just go down the line, if you would like.

Mr. CUTLER. Well, it is a difficult question, I think, for most of us. We are drawing shades of——

Senator LEAHY. What about significant differences?

Mr. CUTLER. I do not see any significant difference myself. I think in the case of Justice Rehnquist we now have some 12 to 14 years of his opinions on the Court. We have not seen much of the jurist Scalia up to now, but I will bet another lunch that we will see several cases every year in the Supreme Court, if you confirm Judge Scalia, with Scalia on one side and Rehnquist on the other.

It is very hard to typecast members of that Court.

Senator LEAHY. Does that go to their judicial interpretation or ideology? How is it difficult?

Mr. CUTLER. Well, it shows, I think, that their sense of what is judicially right in a particular case will overcome their broad ideology or philosophy.

I will give you one example that involves Judge Scalia, and that is the *Liberty Lobby* libel case decided in the Supreme Court this year, in which Judge Scalia's views were reversed by the Supreme Court. There were two dissenters in that case who agreed with one another and with Judge Scalia, and their names were Rehnquist and Brennan.

So in an important first amendment case, Bill Rehnquist and Bill Brennan could be on the same side against the majority of the Supreme Court. That suggests to me that their so-called ideology and philosophy is a lot less important than the way they see a particular case.

Senator LEAHY. For those who do thumbnail sketches of Justices, they normally do not put Justice Rehnquist and Justice Brennan on the same thumbnail.

Mr. CUTLER. No; they would not. And it may be, if you made one of those Harvard Law Review analyses of all the opinions of the Court in the course of the year, you could separate them quite widely.

Senator LEAHY. I understand. Dean Griswold, I also appreciate so much having you here. When you were Solicitor General, I had the opportunity on more than one occasion to hear you argue, watch you, and I always found that as a lawyer one of the greatest thrills I had. I appreciate having you here.

How would you respond to the same question? And I must admit that in asking the question—and I understand Mr. Cutler's answer that this is something you can spend hours on going back and forth. And I do not mean to in any way detract from the question. I want to emphasize that I know it is something you could go on for hours and put the shadings back and forth.

But, Dean Griswold?

Mr. GRISWOLD. Senator, I will venture an answer. In short, I do not think that there is that much difference. I think there may be an appearance of difference which I do not regard as very significant.

And let me try to explain that. I think that Justice Rehnquist is something of a loner. I think he does his own thinking, comes to his own conclusions, and in the past has felt a considerable pressure to state that conclusion.

On the other hand, Judge Scalia is a very gregarious person. He thinks in terms of what the other judges are thinking, and he has not expressed himself so widely or so emphatically as Justice Rehnquist has sometimes in the past.

But I think that if, apart from the way it is expressed, you look at what the positions actually are in a series of cases, you would find that Justice Rehnquist is not as conservative as he is commonly regarded to be. I would not want to say that Judge Scalia is more conservative than he is commonly regarded to be. But I will stand on my opening statement. I do not think there is that much difference, and I have tried to suggest an explanation which makes reasonable people think that there may be such a difference.

Senator LEAHY. Thank you very much, sir.

Mr. VERKUIL. Senator Leahy, I would just like to say I am here to testify on behalf of Judge Scalia's nomination, and I would prefer not to engage in comparisons.

I would add a point, though, about your concern—also Senator DeConcini's concern—over the Freedom of Information Act article and Judge Scalia's positions. As I recall that article, it was in Regulation magazine. It is called something like "The Freedom of Information Act Has No Clothes."

It was meant to be provocative. He was trying to sell copies.

Senator LEAHY. It was. It was.

Mr. VERKUIL. It was, I am sure.

If I recall the article and the substance of it correctly, to allay your concerns about the first amendment issue, is that his concern, and not only his but many people's concern with the Freedom of Information Act is not that its current utilization somehow helps the press; but what it does is help the large users of FOIA who are businesses seeking competitive information. And it imposes enormous cost on the Government to implement it.

And I really believe that the thrust of his comments went to that, not to the first amendment concerns, the access to the press, but more or less to the fact that the instrument designed for the press, if you will, for the public to know has become the favorite of competitors seeking business information. And that has imposed many burdens on the Government.

Senator LEAHY. Sir?

Mr. CASPER. May I just follow up on that, Senator? I entirely agree with Mr. Verkuil in his assessment of the Freedom of Information Act article. Judge Scalia, when he was an academic, in any event, but I am sure it is a quality which continues—possessed a highly developed sense of the absurd, especially when it comes to discovering unintended consequences of regulatory reform, a field in which he is a master. And that was really his main concern with respect to the Freedom of Information Act.

Here is this great liberal reform measure, and see who uses it most? Businesses to find out about their competitors. And that suggests a very important point, Senator. Even the Freedom of Information Act is not all good. The Freedom of Information Act does not only impose burdens on the Government which perhaps a former head of the Office of Legal Counsel might have been critical of, but rather it also imposes burdens on the rest of us.

There is a lot of privacy which goes when the Freedom of Information Act is invoked, and privacy supposedly is also a prime constitutional value.

Ms. HILLS. Senator, I have nothing to add with respect to your question on the comparison issue. I would urge you to understand that a candidate who is asked about a particular statute or a particular amendment finds himself in extremely difficult circumstance. These cases come to the Court on particular facts, and it is the Justice's obligation to give an opinion based upon those facts. Statements made at a confirmation could prove to be enormously embarrassing and really not too helpful in these circumstances, in my view, to this committee.

Senator LEAHY. And you would prefer not to answer the question on comparison of the ideology of the two?

Ms. HILLS. Oh, no. I simply said I could add no more than that that had been contributed so much more articulately by my colleagues on the panel.

Senator LEAHY. Thank you very much. The red light has gone on. My time is up.

I would like to maybe at some other time discuss further the aspects of the Freedom of Information Act, because I do have some very strong views on that.

Mr. Chairman, I appreciate your courtesy in letting the time run over.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. I have no questions at this time.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. You were asked by Senator Leahy to give your views on the close alignment of the ideology views of Judge Scalia and Justice Rehnquist.

Now, let me ask you your opinion of Judge Scalia as a consensus builder on the appellate court, and what do you anticipate that he would contribute or not contribute or detract from consensus building on the Supreme Court?

Ms. HILLS. Are you addressing that question to a particular panelist?

Senator HEFLIN. I will address it to all of you.

Ms. HILLS. I would be most delighted to address that question, having personally worked closely with Judge Scalia at the Administrative Conference at the Department of Justice and subsequently on American Bar Association activities.

He has a phenomenal capacity to draw together diverse points of view and to build a consensus. He is inordinately articulate and can better phrase the issue than almost any other lawyer that I know.

So as a consensus builder, he is without peer, in my opinion.

Mr. CASPER. I agree with Secretary Hills, Senator, and I do think it is important to have somebody on the Court who approaches the Court from that perspective, because the divisiveness of the Supreme Court of the United States in recent years, I think, has become a real and considerable problem.

Mr. VERKUIL. That is the heart of my testimony, Senator.

Mr. GRISWOLD. I think I would say at this point, as I did when I appeared before this committee in support of the nomination of Justice Rehnquist, that I think that Justice Rehnquist, if he is confirmed as Chief Justice, will in fact be much more of a consensus builder than he has been as a Justice. All the evidence indicates that his internal relations are good, and he will have a new pressure to lead the Court, which I think he will rise up to.

I recognize that this is the hearing on Judge Scalia, but the question makes that observation relevant.

Senator HEFLIN. Mr. Cutler.

Mr. CUTLER. I would say his qualities as a consensus builder are so strong that if had turned to politics instead of the bench, I would not want him running for my seat.

Senator HEFLIN. All right, sir. Now, we have pretty much unanimity on consensus building and his abilities there. We have heard your expression, each of you individually, on the similarities of ideology between Associate Justice Rehnquist and Judge Scalia.

Assuming that both were on the Court and that President Reagan appointed two additional members to the Supreme Court with similarities of ideology and the consensus ability of Judge Scalia and the titular position of Justice Rehnquist as Chief Justice, would you expect that the Court would follow a sizably different trend than it is presently following in the field of civil rights, women's rights, freedom of the press, freedom of speech, and basic constitutional rights?

Mr. **GRISWOLD**. The whole history of these things has been that, generally speaking, there is not a great change resulting from changes in the people on the Court. I think it could well be that if there is a more conservative majority on the Court that there will be less reaching out, less extending the law than there has been in the past.

On the other hand, I would not anticipate that there would be widespread overruling of past decisions, repudiation of what was done in the past. I would anticipate that the Court would continue to build on what has been done, although it might not build as fast in some directions as some people might want.

Mr. **VERKUIL**. If President Reagan had the opportunity to appoint four members of the Court as you hypothesize, Senator Heflin, certainly it would be a different Court.

It occurs to me, however, that President Nixon had that opportunity, and the Court that Chief Justice Burger has just indicated a willingness to stand down from, is probably not all as conservative as many would have thought at the time those appointments were made.

So I am not sure one can predict with any assurance exactly where it will be 10, 20 years out, even though obviously a President would like to leave a mark in that sense after his term of office is over.

Mr. **CASPER**. Senator, if I may say two things about that. First of all, four Reagan appointments are, of course, unlikely. Assuming four appointments, I wish there would be then more diversity.

But it is very important to remember two things: The Supreme Court and the country are not really radically out of step at all times; and, of course, also the Supreme Court agenda changes as the country changes its own agenda.

Therefore, it is very hard to know where the Supreme Court will be 5, 6 years down the road because it is very hard for us to predict the agenda. But I think it is very important to remember that many of the issues coming before the Supreme Court, even those styled constitutional in some form or another, are actually issues which come there as matters of interpretation, of longstanding law, statutes, and so on.

If you do not like what the Supreme Court does in some areas, you can recapture a lot of power by passing more liberal or more enlightened or more forthcoming legislation in all areas of life.

Let me just give you an example. Judge Scalia had to pass recently on a case which involved attaching the label "political propaganda" to an import of a film from Canada. And he upheld the labeling. Well, this was done under an extremely offensive act of Congress, and you should not get upset about the Supreme Court or other judges not upholding first amendment values when you have it in your power to see to it that the first amendment values are incorporated into the statutes.

Ms. **HILLS**. Senator, I would say that if the President were so fortunate as to have two more appointments and they were equally as good as Judge Scalia, the practicing bar, of which I am a part, would be fortunate in having fewer fragmented decisions and greater clarity and lucidity in expression, which would be a great help to the public at large and to the body politic. That was, in fact, one of the points I sought to make in my opening remarks.

Senator HEFLIN. You did not answer my question. My question was, would you expect the trend to change relative to certain constitutional rights, not the fragmentation of the opinions.

Ms. HILLS. I find it difficult, where there are fragmented opinions, to discern the trend, and that is what troubles the bar. And forgive me, because I have adopted and endorse the remarks that have been made preceding me. I have just added my small postcript to them, acknowledging the limitations of time; but I do adopt the earlier comments of my colleagues on the panel.

Senator HEFLIN. Well, that is all right.

Ms. HILLS. And I think the trend is very difficult, in the four areas that you specified, often, to find.

Senator HEFLIN. Well, you have answered it now. Thank you.

Mr. CUTLER. Senator Heflin, the bete noire of the neoconservative legal philosophers today is the Warren court. The Warren court included the Chief Justice, Justice Brennan, Justice Harlan, Justice Stewart, all, I believe, appointed by President Eisenhower, the first Republican President in a great many years.

They were pillars of the Warren court decisions in the fields of minority rights and first amendment rights, among others. I certainly am not going to sit here and say to you I think the trend of this Court's opinions is going to be exactly the same if President Reagan has four appointees as if President Carter had had four appointees. But it may turn out—and history tends to confirm this, not only the institutional history of the Court, but the tremendous value of the lifetime appointment—that whatever President Reagan's intentions or his advisers' intentions may have been, he may be in for a big surprise, and the Court may stick to the values that you and every member of this panel think are important.

Senator HEFLIN. Well, basically, to summarize, here is a distinguished group of legal scholars, practitioners and leaders in the legal profession, and you do not have as many fears as some have in this area. Is that a fair summary?

Mr. CUTLER. Yes, sir.

Mr. VERKUIL. Yes, sir.

Senator HEFLIN. All right. That is all.

The CHAIRMAN. Are you through, Judge?

Senator HEFLIN. Yes.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman. I shall be very brief. First, I agree, Mr. Chairman—Mr Chairman, if I may have your attention—if I may have your attention, Mr. Chairman, I agree with you that this is a very distinguished panel, as fine a panel as we have ever had.

And I note that they are very credible because three of the five members of the panel opposed the Manion nomination, Mr. Chairman. I think that gives them added credibility here. [Laughter.]

The CHAIRMAN. Well, anybody can make a mistake sometime. [Laughter.]

Senator SIMON. My question has been addressed by the panel, but I would like to comment. I am one who has not made a commitment on this nominee. I am leaning toward voting for him, but the question which is uppermost in my mind—and I mention this for the benefit of other witnesses who will be testifying—is the question of openmindedness.

Mr. Cutler, you phrased it well when you said that we should reject a nominee, and I am quoting now, "whose ideology so dominates his thinking that he cannot make impartial judgments."

I am concerned in the affirmative action and the first amendment area. Will Judge Scalia be as openminded as President Verkuil has suggested in his remarks? That is my concern. You have addressed it, and I appreciate your appearing here today.

I have no questions, Mr. Chairman.

Senator HATCH. Let me just say something Mr. Chairman.

The CHAIRMAN. Senator Hatch, do you want to ask any questions?

Senator HATCH. I do not know of a more distinguished panel we could have before this committee. I have listened to what you have had to say. It is not only impressive, but erudite and accurate. I want to compliment all of you for coming here and testifying to this committee.

I have admiration for each of you.

The CHAIRMAN. I want to interrupt the proceedings just for a moment here to make an announcement.

There has been an apparent leak of information contained in confidential internal Department of Justice documents provided yesterday to this committee. This is a serious breach of the agreement we reached on the review of these documents. It is also a breach of trust.

Staff reading these documents was admonished yesterday about unauthorized disclosure of any information in the Office of Legal Counsel documents. I am personally angered by this action and consider it irresponsible and unbecoming of anyone entrusted with the task of living by the letter and spirit of the agreement we reached on these documents.

That is precisely why the President was reluctant about turning over these documents in the first place.

As chairman of the committee, I will not tolerate these kinds of disclosures. These are confidential documents and, as such, are not within the public domain. For that reason, I am today asking that the FBI determine whether the matter should be investigated.

Senator HATCH. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Mr. Chairman, to my knowledge, I am the only Senator who has looked at every page of these documents, other than the six Senate staffers who have been reviewing them.

I will not discuss any of the contents of those memorandums, but I can assure everybody that these were legal memorandums on legal issues. I do not think any true lawyer would find fault with the memorandums themselves.

You might differ with legal opinions and different interpretations of legal cases, but I do not think anybody would differ with them.

Frankly, the memorandums basically contain advice to their clients that would not be objectionable to any lawyer or citizen upon careful review, although lawyers differ on various legal cases, interpretations of legal cases.

It was my understanding that these documents were to be held fully confidential. That was the only reason they were to be shared with members of this committee—that is to aid in this constitutional process. If they have, in fact, been leaked, it is an ethical violation of the highest order under these circumstances.

I respect every colleague on this committee. Every colleague has acquitted himself well, but I also have been privy to basically all of the outside of committee discussions. And I have been privy to some of the other discussions as well. There have been some threats heard around here. There has been a tendency not to be totally fair in the Rehnquist hearing. I have been very disappointed in that because we are not just talking about any nomination; we are talking about the nomination for the Chief Justice of the United States. That is pretty important.

I am really disappointed if any of the staffers have disclosed one line of those documents. Activists on either side could point to a line here or a line there that they might not like. But, basically, they could not say that these were not appropriate legal memorandums or that they gave inappropriate legal advice.

I want to put that in the record. I agree with you, Mr. Chairman. I will join with you if the committee rules and ethics rules of the Senate have been violated. I will join with you in doing everything I can to see that that is rectified.

It is terribly disturbing to me because we worked out among Senators and staff a totally inviolate agreement. If this is the way these matters are going to be handled, then it lends not only great credibility, but it lends absolute legal sanction to any President saying I will never give up any confidential legal memorandums from the Office of Legal Policy. It is that simple.

I would not blame any President for not wanting to have that office intruded upon by a legislative process.

Executive privilege is a time-honored constitutional claim. There is not many a constitutional authorities alive who would say that if the President held his ground and refused to give up those documents, that the Supreme Court of the United States would have forced him to release them.

The Supreme Court would have undoubtedly reached the conclusion that it was a political question, even though there are lots of other questions and peripheral questions surrounding that issue.

It is very disappointing to me. If it is true, something has to be done about it.

Thank you, Mr. Chairman. I did not want to be raving, but I just am very disappointed.

Senator HEFLIN. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. I know nothing about this and I happen to be the only Democrat that is present. There may well be some type of response that they would like to make. I think a good deal of charges are being made and the opportunity is being taken here, perhaps unfairly—I am just saying perhaps; I am not saying it has been—to make certain charges.

I would also say that I am not in the position of being a member of the Ethics Committee that this matter would come before, so at this time I do not have any response one way or the other because I do not know. Otherwise I might be in a conflict of interest between two committees.

But I would say that if there has been any violation, certainly from the Ethics Committee's viewpoint, they would want it thoroughly investigated and thoroughly explored. And if any person has violated any agreement or anything else, I think that they would certainly want to look into it and take appropriate action.

The **Chairman**. Any more questions of this panel?

[No response.]

The **Chairman**. I again want to express my deep appreciation to the able and distinguished members of this panel who have come and testified. We appreciate your presence and you are now excused.

And we are going to recess now until 1:30. Panel 2 will be on at 1:30.

[Whereupon, at 12:33 p.m., a luncheon recess was taken.]

[Whereupon, at 1:40 p.m., the committee reconvened, Hon. Charles McC. Mathias, Jr., presiding.]

Senator **Mathias** [presiding]. The committee will come to order.

The first panel this afternoon will be Ms. Eleanor Smeal, of the National Organization for Women; Mr. Lawrence Gold, general counsel of the American Federation of Labor and Congress of Industrial Organizations; and Mr. Joseph Rauh, who will appear for the Americans for Democratic Action.

Joe, before you sit down, if you all will rise to be sworn. Raise your right hands. Do you swear the testimony you will give in this proceeding will be the truth, the whole truth and nothing but the truth, so help you God?

Ms. **Smeal**. I do.

Mr. **Gold**. I do.

Mr. **Rauh**. I do.

Senator **Mathias**. You did not know how Southern I was when I said "you all." [Laughter.]

Ms. Smeal, do you want to begin the panel's discussion? We will observe the 3-minute rule. The lights will indicate the time.

TESTIMONY OF A PANEL, INCLUDING: ELEANOR CUTRI SMEAL, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN; LAWRENCE GOLD, GENERAL COUNSEL, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; AND JOSEPH L. RAUH, JR., ON BEHALF OF AMERICANS FOR DEMOCRATIC ACTION AND LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Ms. **Smeal**. Thank you, Senator.

I am delivering this testimony on behalf of the National Organization for Women and the National Women's Political Caucus. As the president of the National Organization for Women, I am representing the largest feminist organization in the United States, that is interested in eliminating sex discrimination in many different areas.

The National Women's Political Caucus is the largest organization of its kind. It is a bipartisan organization, determined to eliminate sex discrimination in the political arena.

Our testimony is based upon a review of some 120 law cases that Judge Scalia wrote at the circuit court level. Of course, the bulk of these cases are in the area of administrative law, so we have to only review those cases that cover, on point, those issues that we are very, very concerned with.

Because the court record was very brief—he has only been on that court 4 years—we would also turn to his writings and journals, and we also turned to his speeches for his opinions in the areas of constitutional law.

There are three significant areas that concern us, and for the reason that we stand today to oppose his nomination as Associate Justice of the U.S. Supreme Court. Those three areas are affirmative action; his hostility toward the enforcement of the remedial antidiscrimination laws passed by Congress; and his philosophy on individual constitutional rights.

Let me move quickly to the areas—and, of course, 3 minutes will not give me adequate time to review his writings and his work. But let me move quickly to the area of affirmative action.

He has been quite clear in what he thinks of affirmative action. To quote: "I have grave doubts about the wisdom of where we are going in affirmative action and in equal protection generally."

He goes on to say: "I frankly find this area an embarrassment to teach."

He says that, "There are examples abound to support my suggestion that this area is full of pretense or self-delusion."

He essentially takes the position of being a foe of affirmative action. I do not think an objective person could read his writings and come up with any other conclusion. In fact, he has a concept that as the son of Sicilian immigrants, he shares no burden to repay a debt to a group his ancestors, he believed, never wronged.

I wanted to call attention to his quotes in this area because at a personal level I find it very difficult to sit here in opposition to the nomination of the first Italian-American. I am a person who believes in breaking down barriers and am the daughter of Italian-American immigrants. But my experience has led me to the exact opposite conclusion. I believe it is necessary to have affirmative action.

I am also very, very concerned with his use of the law and the cases. He seeks to strike down or to most limitedly interpret both race and sex discrimination laws, and he seeks to give the most narrow interpretation on remedies.

For example, on the 9-to-0 decision in sexual harassment that was just handed down, he would have been the lone voice against it, saying sexual harassment does not fall under the sex discrimination restraints laws of title VII.

Senator MATHIAS. I am afraid I have to enforce the 3-minute rule. However, the committee will have an opportunity to ask some questions and get back to some of the examples you are interested in.

[Prepared statement follows:]

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Testimony of
Eleanor Cutri Smeal
President, of the National Organization for Women

On Behalf of the National Organization for Women
and the National Women's Political Caucus

Before the Senate Committee on the Judiciary
on the Nomination of Antonin Scalia for Associate Justice
August 5, 1986

I am Eleanor Smeal, president of the National Organization for Women, and I come before the Committee today on behalf of the largest feminist organization in the United States to oppose the appointment of Antonin Scalia as Associate Justice of the U.S. Supreme Court.

While Judge Scalia has sat on the United States Circuit Court for the District of Columbia for only four years, and therefore we do not have an extensive judicial record to review in evaluating his positions on the rights of women and of minority members of our society, we would submit that even his short tenure as judge is sufficient to reveal a hostility toward the enforcement of remedial anti-discrimination laws passed by the Congress.

In addition, we have reviewed those law journal articles and writings prepared for the American Enterprise Institute for Public Policy Research of which we are aware, and which do address the issues of vital concern to us, and we believe these written statements underscore Judge Scalia's hostility to remedies against sex and racial discrimination. Furthermore, we are struck by his penchant to ridicule and to trivialize not just the remedies themselves but the very notion that those who have suffered from discrimination should in any way be given special consideration to end these patterns of discrimination.

I. Opposition to Affirmative Action

Judge Scalia, a foe of affirmative action, has been very careful to couch his opposition in what we are sure he believes to be appropriate language. He acknowledges, for instance, that society owes a debt to the underprivileged, but he makes clear that by this he means those who we would classify as poor economically.

He would not extend the notion of indebtedness to any person or group that has suffered discrimination and has been denied equal opportunities in education or employment simply on the basis of race or sex.

He has, in fact, made a point of ridiculing Justice Powell's decision in the Bakke case as reflecting a racist concept of restorative justice which he reduces to an Anglo-Saxon notion of guilt for the enslavement of the black people in our nation. Judge Scalia is very clear that as the son of Sicilian immigrants, he shares no burden to repay a debt to a group his ancestors never wronged.

At a personal level, as the daughter of Italian immigrants, I can tell this Committee that I wish my parents and grand parents had had the benefits of affirmative action. My experience with ethnic and gender discrimination has led me to a lifetime of strong support of measures to eliminate any kind of discrimination based on race, ethnicity, religion, sex, sexual preference, physical handicap or age -- not sophomoric verbal and mental exercises which are mere justifications for social Darwinism. Judge Scalia's views by no means represent a consensus in the ethnic community which we have common.

On a much broader level, the National Organization for Women finds it unconscionable that a federal appeals judge and a would-be Justice of the Supreme Court would summarily dismiss as unimportant over 200 years of discrimination against a racial minority in America simply because his ancestors didn't directly participate in the discrimination.

We would ask that you consider carefully the scathing ridicule that Judge Scalia's heaped upon the concept of affirmative action in the Winter, 1979, issue of the Washington University Law Quarterly:

> To remedy this inequity, I have developed a modest proposal, which I call RJHS - the Restorative Justice Handicapping System. I only have applied it thus far to restorative justice for the Negro, since obviously he has been the victim of the most widespread and systematic exploitation in this country; but a similar system could be devised for other creditor-races, creditor-sexes or minority groups. Under my system each individual in society would be assigned at birth Restorative Justice Handicapping points, determined on the basis of his or her ancestry. Obviously, the highest number of points must go to what we may loosely call the Aryans - the Powells, the Whites, the Stewarts, the Burgers, and, in fact, (curiously enough), the entire composition of the present Supreme Court, with the exception of Justice Marshall. This grouping of North European races obviously played the greatest role in the suppression of the American black. But unfortunately, what was good enough for Nazi Germany is not good enough for our purposes. We must further divide the Aryans into subgroups. As I have suggested, the Irish (having arrived later) probably owe less of a racial debt than the Germans, who in turn surely owe less of a racial debt than the English. It will, to be sure, be difficult drawing precise lines and establishing the correct number of handicapping points, but having reviewed the Supreme Court's jurisprudence on abortion, I am convinced that our Justices would not shrink from the task.
>
> Of course, the mere identification of the various degrees of debtor-races is only part of the job. One must in addition account for the dilution of bloodlines by establishing, for example, a half-Italian, half-Irish handicapping score. There are those who will scoff at this as a refinement impossible of achievement, but I am confident it can be done, and can even be extended to take account of dilution of blood in creditor-races as well. Indeed, I am informed (though I have not had the stomach to check) that a system to achieve the latter objective is already in place in federal agencies - specifying, for example, how much dilution of blood deprives one of his racial-creditor status as a "Hispanic" under affirmative action programs. Moreover, it should not be forgotten that we have a rich body of statutory and case law from the Old South to which we can turn for guidance in this exacting task.

We would also ask that the committee note in this particular commentary by Judge Scalia the fact that he holds sex discrimination as even less important that racial discrimination, and that he is blatantly contemptuous of the present Supreme Court for its ruling on the legality of abortion.

II. Opposition to Remedial Provisions for Discrimination in

Employment

In reviewing the few employment cases in which Judge Scalia has participated in his four years on the federal bench, his hostility to remedies for both sex and racial discrimination become even more apparent.

His principal role has been to dissent, to generally oppose the remedial provisions of Title VII laws, and to interpret them so narrowly as to virtually render ineffective the Congressional intent behind the laws.

Mr. Chairperson, members of the Committee, we would again remind this Committee that in a public opinion poll released just two weeks ago 63 percent of Americans said judges should be committed to equal rights for women and minorities. We also would remind this Committee that the notion of equal rights for women and minorities received a higher support level than any President has received since the 1936 general election.

We also would submit that Judge Scalia's record doesn't even approach a commitment to equal rights for women and minorities in our nation.

In Vinson v. Taylor, 753 F. 2d 141 (D.C. Cir. 1985), rehearing denied, 760 F. 2d 1330 (D.C. Cir. 1985), affirmed sub nom Meritor Savings Bank v. Vinson, (S. Ct., July, 1986), Judge Scalia joined a dissent that argued for a rehearing on the grounds that the three-judge panel initially hearing the case had misinterpreted Title VII as it applies to cases of sexual harassment. The original panel had made the following holdings:

(1) sexual harassment in violation of Title VII need not involve an exchange of sexual favors for employment; rather, a discriminatory workplace is sufficient;

(2) a sexual harassment victim does not lose her right to legal redress because she capitulated to sexual advances;

(3) evidence that other employees were harassed is admissible;

(4) evidence as to the victim's dress and personal sexual fantasies is not admissible; and

(5) the employer is liable for its supervisor's harassment of an employee.

Judge Scalia, in dissenting, disagreed with most of these holdings. First, according to the dissenting opinion that he joined, sexual harassment is "individual" and hence not "discrimination in conditions of employment because of gender," and should not be viewed as a violation of Title VII. This extreme position was rejected by all present justices of the Supreme Court in the Vinson case, even by Justice Rehnquist. However, Judge Scalia evidently believes the nonsensical argument that when women are sexually harassed, their sex is not an issue. This notion is as illogical and cruel in its application as is the idea that discrimination on the basis of pregnancy is not sex discrimination.

Second, the dissent claimed that evidence of "voluntary" submission to harassment is a defense. According to the dissent, he evidently believes that a victim of discrimination can have no redress if she ever capitulates to the harassment for fear of retaliation. This view is inconsistent with the remedial purpose of Title VII law in general. A victim of wage discrimination is not, for example, denied a remedy because she accepted work at the discriminatory wage rate.

Third, the dissent claimed that evidence as to the victim's dress and personal fantasies was admissible as "relevant to the question of whether any sexual advances by her supervisor were solicited or voluntarily engaged in," and therefore relevant to "the presence of discriminatory intent."

This outrageous position requires some emphasis because it is based on a belief that how a woman dresses, and the content of her intimate thoughts, are relevant to whether or not someone harassed her. In other words, what the harasser did is based on how the victim looked.

The dissent sought to revive the old defense of "she asked for it," and sought to place the victim on trial in a manner similar to the way that rape victims were once viewed in virtually all state court criminal proceedings. This position is particularly preposterous in view of the fact that, in no other area of Title VII law, is the victim's dress or personal thought process a defense to discrimination. The dissent, evidently, sought to return to the days when a woman's sexuality was viewed as provocation for assault.

Finally, the dissent opposed any employer liability for sexual harassment. The dissent relied on the limited tort theory of liability that "sexual escapades" should not result in employer liability "because they are personally motivated." The dissent further ignored the fact that, in passing Title VII, Congress chose to reject the limited tort theories of liability. Congress decided that employment discrimination is such a serious, pervasive problem that nothing short of a strong remedy will suffice. The dissent ignored the fact that other forms of employment discrimination, while also potentially "personally motivated," result in employer liability. The dissent made the paradoxical claim that if women are sexually harassed, as women, the harassment is personal.

Judge Scalia's other dissents show similar insensitivity to other types of employment discrimination. In Carter v. Duncan-Huggins, Inc., 727 F. 2d 1225 (D.C. Cir. 1984) the Court considered an appeal of a jury verdict awarding plaintiff $10,000 in damages for discriminatory activities under the Civil Rights Act of 1870, 42 U.S.C. S1981. Plaintiff had alleged racial discrimination in employment. (She was not able to file a suit under Title VII because the employer had less than 15 employees.)

After the jury's verdict, the company sought a judgment n.o.v. (notwithstanding the verdict, also sometimes called a "directed verdict") on the ground that there was insufficient evidence.

The burden in such a request is on the moving party. That is, the employer had to prove that no reasonable jury could have reached the verdict under any circumstances.

The District Court and the Court of Appeals both denied the employer's request. In its holding, the Court of Appeals reviewed the evidence which was the basis for the verdict. Plaintiff was the company's first, and only, black employee. She was physically segregated from other employees. While she was expected to make sales, she was also isolated from the showroom floor and from any contact with customers. She was not permitted to answer the telephone. She was the lowest paid full-time employee; she was paid less than other employees with less seniority and similar qualifications. She was awarded smaller bonuses. She also suffered other unequal treatment in her day-to-day work.

Testimony at trial focused on four issues: (1) prohibition against plaintiff's attendance at staff meetings, to which all other employees were invited; (2) denial of parking privileges available to others; (3) denial of a key to the work facility, also available to others; and (4) a racially derogatory anecdote. The Court recited these facts, and found that a jury could reasonably conclude that there was racial discrimination and that it was intentional (motive is a requirement for 42 U.S.C S1981 cases).

Judge Scalia dissented. He believed that there was no evidence of discriminatory treatment and no showing of racial motivation. He found that the company's small size precluded salary comparisons even among similarly qualified employees. He also found that there were reasonable grounds for all of the other distinctions made by the employer in his treatment of the black employee. Finally, he concluded that even if the treatment was discriminatory, there was no showing of racial motive. Thus, he felt that no reasonable person could conclude that the "allegedly differential treatment was race-related."

Judge Scalia had the following to say: "If this case did not call for a directed verdict, it is difficult to imagine any small business hiring a minority employee which does not, in doing so, commit its economic welfare and its good name to the unpredictable speculations of some yet unnamed jury."

Clearly, he not only failed to see plain, naked discrimination when it stared him in the face, he also had total contempt for the jury system by assuming that juries will speculate and ignore the evidence.

Finally, even though Judge Scalia supposedly prides himself on strict application of the law, in this case he ignored the legal standard for directed verdicts, which requires that jury verdicts be reversed only if they are totally implausible.

In Poindexter v. F.B.I., 737 F. 2d 1173 (D.C.Cir, 1173), the Court of Appeals confronted that provision of Title VII which requires trial courts, in their discretion, to find counsel for Title VII plaintiffs who are too poor to afford counsel or who are otherwise unable to obtain counsel. 42 U.S.C. S2000e-5(f)(1).

The majority of the panel found that, in determining whether to appoint counsel, the trial court should consider the ability of the plaintiff to pay for her/his own attorney, the merits of the case, the efforts of the plaintiff to obtain counsel, and the ability of plaintiff to represent her/himself in the absence of counsel. The Court of Appeals then found that the trial court had not considered all of these factors and remanded the case.

Judge Scalia dissented. He agreed with the majority's analysis of the requirements for appointment of counsel. He found that the plaintiff, a black male coding clerk at a GS-6 level, was sufficiently wealthy to hire counsel even after his termination from employment. As one of his reasons for this conclusion, Judge Scalia cited $196 per week of unemployment compensation received by plaintiff.

Obviously Judge Scalia is either unaware of the contemporary cost of living and of obtaining legal counsel, or he deliberately wants to weaken the remedial provisions of Title VII.

A similar situation arose in Trakas v. Quality Brands, 759 F. 2d 185 D.C. Cir. 1985). In this instance, the female plaintiff filed a sex discrimination lawsuit. She subsequently moved from Washington to St. Louis. The trial date was scheduled. Two days before trial, plaintiff advised her counsel that she would be unable to travel to Washington, D.C. because her husband had recently lost his job and she had no funds for the trip. Her counsel sought a continuance.

The trial court denied a continuance and dismissed the case for failure to prosecute. The Court of Appeals found that, in the special circumstances of the case, this was abuse of discretion and remanded the case.

Judge Scalia dissented, again because of this skepticism about the plaintiff's inability to pay. In his dissent, he referred to plaintiff's husband as an attorney, ignoring the fact that he had recently lost his employment. Again, he ignored the remedial and equitable nature of Title VII law.

III. Philosophical Opposition to Constitutional Rights of Individuals

While Judge Scalia's record in these cases is of grave concern to NOW, we are equally appalled by his philosophical opposition to constitutionally guaranteed rights for individuals.

His notion that the rights of individuals are only those which the majority confers, and not guaranteed by the Constitution regardless of majority views, would, if it became the dominant view, serve to undermine the Constitution and in particular the Bill of Rights which he is sworn to protect and defend.

During a public discussion sponsored by the American Enterprise Institute, Judge Scalia, at that time a visiting scholar for the Institute, made crystal clear his view not only on abortion rights but individual Constitutional rights in general:

> In the abortion situation, for example, what right exists - the right of the woman who wants an abortion to have one, or the right of the unborn child not to be aborted? In the past that was considered to be a societal decision that would be made through the democratic process. But now the courts have shown themselves willing to make that decision for us ...
>
> The courts' expansion stems, in part, from their function of deciding what are constitutional rights. Much of their activity is in that area, and I think they have gone too far. They have found rights where society never believed they existed.
>
> The courts have enforced other rights, so-called, on which there is no societal agreement, from the abortion cases, at one extreme, to school dress codes and things of that sort. There is no national consensus about those things and there never has been. The courts have no business being there. That is one of the problems; they are calling rights things which we do not all agree on.

Mr. Chairperson, members of the Committee, I cannot convey adequately the alarm with which the National Organization for Women greeted these words by Judge Scalia.

The very notion that rights are determined by consensus has to rank among the most appalling concepts we have ever encountered.

To begin with, consensus means agreement by almost everyone, if not everyone. Given the definition, I am sure we can all agree that there are few things in our national life in which we have consensus, in light of the broad diversity and make-up of American society.

Just how large a majority must Judge Scalia have to confront in order to deem that there is a consensus on a given question? Will a simple majority suffice? Is a 74 percent majority, enormous by most standards, large enough to convince him?

As we have submitted earlier to this Committee, the latest public opinion poll on the question of abortion shows that 74 percent of Americans support the Supreme Court's 1973 ruling on legalized abortion.

We doubt, however, that this is the real issue for Judge Scalia, anymore than it is the real issue for the National Organization for Women.

NOW believes that women have the right to abortion, as a matter of privacy and of individual rights, regardless of what public opinion polls show.

And we believe Judge Scalia holds the view that no such right exists, regardless of what public opinion polls show. In fact the Reagan Administration has made it abundantly clear that hostility to the Roe v. Wade decision is part of the screening process for nomination to the federal judiciary at all levels.

We would submit that unless the Reagan Administration was totally confident of Judge Scalia's views on abortion rights, his name would not be before this Committee. Period.

But in addition to the abortion issue, which is of crucial importance to our organization, we would ask this Committee to examine closely Judge Scalia's concern that the courts "are calling rights things which we do not all agree on."

Is this simply another way of stating Justice Rehnquist's appalling claim that "in the long run it is the majority who will determine what the constitutional rights of the minority are."

Again, I would refer the Committee to Judge Scalia's standards of general societal agreement and national consensus. As we mentioned earlier the latest public opinion poll on the question of judicial response to racial and sex discrimination shows that 63 percent of Americans believe our judges should be committed to equal rights for women and minorities. Again, is this, a larger majority than elected Ronald Reagan President, large enough to satisfy Judge Scalia's standards?

I believe we know the answer to that, and I believe this Committee does also.

Judge Scalia does not believe the rights of women and minorities are determined by majority opinion any more than we do. Either the Constitution and the laws of our nation confer these rights or they do not, regardless of shifting political majorities.

The fact that the majority now supports these rights is simply a credit to the people of this nation that at long last we have come to recognize, as a people, that in order to remain true to our ideals, we must in fact constantly pursue "liberty and justice for all."

The people of this nation have come to the realization that these rights exist.

We believe it is evidence of Judge Scalia's extremist viewpoint on Constitutional rights that he refuses to concede their existence.

This is not testimony to his independence and intelligence as a jurist. It is testimony to his unfitness to preside as one of a nine-member panel whose job it is to defend Constitutional rights.

In line with Judge Scalia's pronouncements on "national consensus," "societal agreement," and abortion in the AEI panel discussion, he also said that in drawing the line in the area of constitutional rights, "it would fall short of making fundamental, social determinations that ought to be made through the democratic process, but that the society has not yet made. I think the Court has done that in a number of recent cases. In the busing cases ... there was no need for the courts to say that the inevitable remedy for unlawful segregation is busing. Many other remedies might have been applied. It was not necessary for the courts to step in and say what must be done, especially in the teeth of an apparent societal determination that the costs are too high in terms of other values of the society."

Now, Judge Scalia didn't offer in that discussion any suggestions as to what those "many other remedies" might be, only that he was sure they existed.

What he was really saying, we know from both experience and from other of his writings, is that the Court is only there to rule, not to provide remedies for injustice, and that if the executive and legislative branches choose not to enforce a ruling, then so be it -- regardless of how abominable the injustice.

Does anyone, including Judge Scalia, seriously believe that Southern school systems, not to mention school systems elsewhere, as well as public accommodations in the South, would really have integrated on their own if the Court had not forced enforcement of its ruling?

Does anyone, including Judge Scalia, seriously believe that the majority in this instance would not have continued to deny the black minority in this nation its rights if that majority thought it could get away with it?

Now, in that same discussion which, incidentally, was titled, "An Imperial Judiciary: Fact or Myth?", Judge Scalia went on to say that the Court doesn't always have to "go along with the consensus of the day. The Court may find that the traditional consensus of the society is against the current consensus. If that is the case, then the Court overrides the present beliefs of society on the basis of its historical beliefs. I can understand that."

"But when neither history nor current social perception demands that something be called unlawful, I cannot understand how the Court can find it to be so."

You should know that when confronted with the suggestion that both the traditional consensus and the contemporary consensus were against school desegregation in 1954, Judge Scalia replied that he didn't "believe that is true. Most of the country did not consider separate black schools proper in 1954."

Considering the history of the decade that followed the Brown v. Board of Education, I think we can say with confidence that Martin Luther King, Jr. would have been surprised to learn this from Judge Scalia.

While it is somewhat comforting to know that Judge Scalia ended the discussion of Brown v. Board of Education with the comment that, "In any event, the results of that decision have been very good," we are still left more than a little confused. The results of that decision, after all, also included the remedy of busing, and Judge Scalia doesn't believe the Court should order remedies.

We also find a great deal of danger in Judge Scalia's belief that it is proper for the Court to override the present beliefs of society on the basis of its historical beliefs.

It is staggering to contemplate the list of contemporary beliefs that would be at risk in the hands of a Justice Scalia, certainly sex and racial discrimination being just two areas of belief.

Just as frightening is the fact that Judge Scalia made no provision for the reverse: that it is proper for the Court to override historical beliefs on the basis of the present beliefs of society.

These are just a few instances in which Judge Scalia's logic falls apart upon analysis.

We would ask the Committee also to consider the following commentary from an article written by Judge Scalia in 1980, titled "The Judges are Coming", and reprinted in the Congressional Record of July 21, 1980, at the request of former Congressman Daniel Crane of Illinois:

> Thus, the Congress passes a law requiring the Department of Health, Education and Welfare to assure the elimination of "sex discrimination" in federally assisted educational programs. Everyone applauds. Who, after all, can be in favor of sex discrimination? It soon develops, however (as Congress knew when it passed the law), that "elimination of sex discrimination" is only a slogan. To some, it means little more than equal job opportunity and equal pay for equal work. To others, it includes also the expenditure of equal funds on men's and women's sports; or even the prohibition of all-male or all-female team sports; and to still others (quite seriously) the elimination of father-son dinners, unisex dorms or even unisex toilets. Who is to tell us, then, what the Congress meant - when in point of fact it did not know what it meant, and quite obviously did not want to know for fear of antagonizing one or the other side of the sexual revolution? The answer, of course, is the courts. In lawsuits challenging HEW's actions, they will ultimately develop for us a whole body of law concerning sex discrimination on the basis of virtually no guidance from our elected representatives in Congress.

In this case, Judge Scalia conveniently overlooks the fact that federal regulations were written and enforced by the Department of Health, Education and Welfare to enforce the provisions of Title IX of the Civil Rights Act. These regulations were based upon the public hearings and input and the legislative history of the Act.

He chooses to ignore that these regulations were enacted with a significant measure of success creating a substantial body of experience for Title IX. And, although many institutions of higher learning in our nation did not like being told they could not discriminate on the basis of sex, and still others spent a great deal of time trying to skirt the law, they knew what the regulations said and what they were legally required to do.

The gutting of Title IX was not done by a faint-hearted Congress. It was done by an executive branch that thought the government should be allowed to fund discrimination and that went to the Court to get a ruling allowing it to do so.

Ultimately, it was the Supreme Court that reversed the remedial effects of Title IX: in the face of clear Congressional intent to eliminate sex discrimination in education; in the face of a legislative and regulatory history that showed over a decade of progress in this area; and in the face of majority support in this nation for the elimination of sex discrimination in education.

7 Mr. Chairperson, members of the Committee, Judge Scalia has demonstrated that he is more than happy to go on the record with his beliefs about sex discrimination and about racial discrimination, even though he actually has had few opportunities to rule in these areas as a Judge.

He could not be more clear in his belief that these areas of law are, at best, a nuisance, and at worst, unworthy of his consideration.

We ask this committee, on behalf of the women of this nation and on behalf of the minority members of our society to reject a nominee to the U.S. Supreme Court who has no intention of using the Constitution and laws of this nation to help move this country toward equal rights and equal opportunities for all its citizens. In fact, reviewing his record and writings on affirmative action, discrimination law and individual rights, he is willing to use the Constitution to obstruct the advancement of equal rights.

We ask this Committee to reject the nomination of Antonin Scalia as Associate Justice of our U.S. Supreme Court.

Thank you.

Senator MATHIAS. Mr. Gold.

STATEMENT OF LAWRENCE GOLD

Mr. GOLD. Thank you, Senator Mathias.

The AFL–CIO was not asked to testify to argue for or against Judge Scalia's nomination, but to voice certain concerns about his conception of the Constitution and of the lawmaking process, and to ask the committee to explore in depth certain issues we believe are of great consequence. Our views are tentative because while we have read all of his legal writings, that effort has yielded only a limited number of relevant pieces of information, principally in his occasional academic pieces. Against that background, we wish to make the following points.

First, it appears to us that Judge Scalia is intent on demoting Congress from its primary place in making national policy. His views on statutory construction, on standing, on the President's appointment power, on the nondelegation doctrine, and on the legislative veto are tied together by the common thread that in each instance, he would hobble Congress and aggrandize Executive power.

Second, we would suggest that Judge Scalia's conception of the judicial role in interpreting and enforcing the Bill of Rights leaves little, if anything, of substance. His most telling quote is that, "The Bill of Rights to some degree is like a commercial loan: You can only get it if at the time, you do not need it." What that would leave of the legitimacy of *Brown* v. *Board of Education, New York Times* v. *Sullivan,* or *Baker* v. *Carr,* to note only three decisions which we believe were not only right but necessary, is difficult for us to discern.

Finally, we wish to point out that the discontinuity in Judge Scalia's approach to issues concerning the allocation of power between Congress, the President, and the Judiciary, and his approach to issues concerning the power of government over the individual, indicates that his legal positions are not the product of the doctrine of judicial restraint, but of his own social and political views. His inventiveness in finding limitations on the legislative power stands in stark contrast to his quietist position on the guarantees of individual rights.

It is the committee record on these matters that will determine our position on Judge Scalia's nomination, and that we hope will determine the committee's position.

Thank you.

Senator MATHIAS. Thank you.

[Statement follows:]

TESTIMONY OF LAURENCE GOLD, GENERAL COUNSEL OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, TO THE JUDICIARY COMMITTEE OF THE U.S. SENATE ON THE NOMINATION OF JUDGE ANTONIN SCALIA TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

August 6, 1986

The AFL-CIO appreciates this opportunity to appear before the Judiciary Committee to testify on the nomination of Judge Antonin Scalia to be an Associate Justice of the Supreme Court. We do not appear at this time to oppose or to support Judge Scalia's nomination but to raise questions about the nominee's views -- as we glean his views from his writings -- concerning the role of Congress in setting national policies and the role of the judiciary in enforcing the Bill of Rights. If we understand those views correctly, they raise serious issues as to what the Constitution means and how we conduct our public life. We discuss these questions in the hope that they will be fully explored in these hearings and out of our sense -- which we share with the Committee -- of the profound importance of this nomination, and of each nomination to the Supreme Court, in light of the Court's major role in the Nation's affairs.

I.

It is appropriate at the outset to state briefly our understanding of the proper role of the Senate in passing on a Supreme Court nomination; without a theory as to the basis on which the Senate may or should act, it is impossible to discuss intelligently whether a particular nominee should be confirmed.

We believe first of all that the contention that the Senate's role in passing on a Supreme Court nomination is merely to assure itself of the nominee's intelligence and character -- a position that seems to have some currency at present -- is unsound. Whatever the merits of that approach may be in deciding whether to confirm a Presidential appointment to the Executive Branch, where the appointee will be assisting the President in performing the President's duty to take care that "the laws [of the United States] be faithfully executed," it makes no sense to suggest that the Senate's role should be equally circumscribed with respect to nominees for the judiciary, an independent branch of government. The Executive Branch and particularly the Cabinet may in some sense "belong" to the President, but surely the Supreme Court does not; it is the Supreme Court of the United States.

Those who would so narrowly limit the role of the Senate in passing on a judicial nominee can find no support for their approach in either the constitutional text or in constitutional history. As Professor Charles Black has stated, the words of Article II, section 2, clause 2 -- the "Advice and Consent" clause -- "make [it] next to impossible" to conclude that the Senate's role is "confined to screening out proven malefactors."[1] Nor was that the intent of the Constitution's framers; the proceedings of the Constitutional Convention reveal that there was substantial support in the Convention for granting the Senate sole power to appoint judges, and that the Advice and Consent provision emerged as a compromise, one that would place a check on the President's appointment power by, as Hamilton put it, subjecting "the propriety of [the President's] choice to the discussion and determination of a different and independent body."[2]

Thus, with respect to the shaping of the judiciary, as with respect to so many other matters, the Constitution is indeterminate with respect to the role of Congress; the plan of the framers was to give both the President and Congress a voice, and to leave it to those two bodies to vie continuously with each other for the public sentiment that determines the extent to which the voice of a particular branch will be controlling at particular moments in history.

For two hundred years, the Senate has recognized and asserted its constitutional prerogatives in passing upon Supreme Court nominees. In 1795, the Senate refused to confirm a Supreme Court nominee of President Washington. And during the 1800s, seventeen Supreme Court nominations failed of confirmation for what Professor Rees aptly describes as "political or philosophical reasons."[3]

In particular, there can be no doubt that, as the Chairman of this Committee, Senator Thurmond, stated in opposing Justice Fortas' nomination to the office of Chief Justice, "the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and the role of the Court in dealing with these issues."[4] Justice Rehnquist put it this way in an article he authored over 25 years ago: "what could [be] more important to the Senate than [a nominee's] view on equal protection and due process."[5] Professor Black has elaborated on the point as follows:

> In a world that knows that man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote. I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view."[6]

This is not to say that it would be an appropriate exercise of the Senate's power to refuse to confirm any nominee who does not share, in all particulars, the political or philosophical beliefs of a majority of the Senate. With respect to many issues of the day, a nominee's personal views have little or no bearing on how that nominee will perform the judicial role. And even with respect to those broader issues of politics or philosophy that undoubtedly do shape how a nominee would go about judging, the appointment process would quickly deadlock if each branch of government were to insist on its own version of ideological purity. But there can be no doubt of the propriety of closely examining a nominee's philosophy to determine whether there are, to quote Hamilton, "special and strong reasons" to refuse to confirm that nominee.[7]

II.

There are two aspects of Judge Scalia's judicial philosophy which we believe merit close scrutiny.

First, as we shall explain, there is substantial reason to doubt whether Judge Scalia accepts the fundamental principle that it is for Congress to make national policy and for the Executive to implement that policy. Judge Scalia's position, as we understand it, is that the Executive should be free to nullify duly-enacted and Presidentially-approved law by refusing to enforce such laws or by enforcing their "plain" terms without seeking to ascertain what Congress intended. This area is an especially appropriate one for congressional attention, because to the extent the President uses his appointment power to select nominees who will transfer power to the Executive at the expense of Congress, it is entirely proper for Congress to refuse to give its consent to such nominations.

The second area to which we invite the Committee's attention concerns Judge Scalia's reading of the Bill of Rights and the Fourteenth Amendment. While the materials are more sketchy, Judge Scalia appears to approach those vital constitutional guarantees in a way that would drain them of their significance. Indeed, it seems safe to conclude that Judge Scalia was nominated in large measure for that very reason, just as Justice Rehnquist undoubtedly was nominated to be Chief Justice because he has consistently refused to enforce the guarantees of the Bill of Rights. And if that is the ground on which these nominations have been made, it is surely proper for the Senate to base its decision on whether to give its consent on these very same grounds. As Professor Black has argued, to offer advice and consent without "consider[ing] the same things that go into the decision is ordinarily "derelict[ion] in . . . duty."[8]

III.

To be precise, the President has not yet nominated Judge Scalia to be an Associate Justice of the Supreme Court but has stated his intention to do so if and only if Justice Rehnquist is confirmed as Chief Justice. Some preliminary words on the nomination actually pending before this Committee, that of Justice Rehnquist to be Chief Justice, are therefore in order.

The AFL-CIO is part of the Leadership Conference on Civil Rights and subscribes to its testimony on Justice Rehnquist's nomination. Because our views were thus represented, and because of the large number of otherwise unrepresented organizations which wished to testify with respect to Justice Rehnquist's nomination, we did not ask to take up the Committee's time during last week's hearings. We would be remiss however if we did not use the occasion of this testimony to state in our own words our reasons for urging the Committee to vote not to confirm Justice Rehnquist as Chief Justice.

In 1971, the AFL-CIO opposed the confirmation of Mr. Rehnquist to be an Associate Justice because, as we stated at that time, his "public record demonstrates him to be an extremist in favor of . . . diminution of personal freedom." We believe that Justice Rehnquist's record on the Supreme Court over the past fifteen years confirms our essential fear: he is an ideologue with a closed mind to the great majority of valid claims based on the Bill of Rights or the Fourteenth Amendment.

In preparation for this testimony, we have reviewed every constitutional decision in which Justice Rehnquist has participated since joining the Court. That review leaves no doubt that on a Court whose majority has been appointed by Presidents Nixon, Ford and Reagan and which takes a quite modest view of the Bill of Rights' protections -- a Court quite unlike the Warren Court -- Justice Rehnquist stands alone in his doctrinaire insensitivity to individual rights. In this context, the number of constitutional cases in which Justice Rehnquist has dissented alone assumes significance, for that number reveals the extent to which Justice Rehnquist falls to the right of an essentially conservative Court. Equally significant are the extreme views Justice Rehnquist has expressed in those isolated dissents -- and in solitary concurring opinions as well -- such as his view that the Equal Protection Clause does not offer protection to all "discrete and insular minorities" but only to blacks[9/], that the First Amendment permits a city to exclude from a public auditorium performances the city views as offensive so long as the city's judgment is not "arbitrary or unreasonable"[10/], or his view that the Establishment Clause allows the government to promote religion so long as it does not aid one particular religion.[11/] The short of the matter is that on virtually any constitutional issue that comes to the Court, his "no" vote is all too predictable.

It has been argued that Justice Rehnquist's cramped reading of the Bill of Rights is justified by the theory of judicial restraint; the theory that the judiciary should keep its review within narrow limits in order to maximize the freedom of the democratically-elected branches of government to work their will. But of course the entire point of the Bill of Rights is to place limitations on the majority's power. The reason for a written Constitution enforced by an independent Judiciary is to see to it that those limitations are respected. At most, then, the theory of judicial restraint justifies deference to the popular branches in the truly hard cases and not an across-the-board abdication by the judiciary. Thus, in our view, Justice Rehnquist is wrong in the most fundamental respect when he argues that so long as the majority has a reasoned base for discriminating against a minority or for infringing on the freedom of speech or of religion, the majority is privileged to do so.

If, however, Justice Rehnquist were a consistent and faithful practitioner of judicial restraint, there might at least be a credible case to be made for his nomination. But the reality is that he is not; when it suits his ideological purposes -- when there is an opportunity to further his own agenda -- Justice Rehnquist has been the most activist of jurists.

Perhaps the best known and most pronounced example of this tendency is his decision in National League of Cities v. Usery, 426 U.S. 833 (1976), holding unconstitutional an act of Congress requiring public employers to pay their employees the minimum wage. In National League, Justice Rehnquist concluded that although the law in question was "fully within the grant of legislative authority contained in the Commerce Clause," id. at 841, that law violated an "affirmative limitation" on Congress' power, id. at 842, one that interdicts federal legislation that interferes with "the States' freedom to structure integral operations in areas of traditional governmental functions," id. at 852.

To the extent Justice Rehnquist in National League identified a source in the constitutional text for this "affirmative limitation," that source was the Tenth Amendment -- a strange source, indeed, because that Amendment provides, in terms, that "The powers not delegated to the United States by the Constitution . . . are reserved to the States," and thus cannot be read to restrict the powers that are "delegated to the United States by the Constitution." Indeed, one year earlier, Justice Rehnquist acknowledged this very fact.[12] The reality is, then, that in National League -- unlike in cases involving individual rights[13] -- Justice Rehnquist was essentially unconcerned about finding a source in the constitutional text for the limitation on congressional power he expounded.

Justice Rehnquist was likewise unconcerned in National League by the absence of any evidence that the framers of the Constitution affirmatively intended that limitation or by the fact that the limitation had been unknown in constitutional history for almost two hundred years; it was Justice Brennan's dissent in National League that relied on the Federalist Papers, the writings of James Madison, and on decisions of the Supreme Court from McCulloch v. Maryland, 4 Wheat 816 (1819), to Justice Harlan's opinion for the Court in Maryland v. Wirtz, 392 U.S. 18 (1968), (an opinion which National League cavalierly overturned). See 426 at 856-81 (Brennan, J., dissenting). And Justice Rehnquist was equally unconcerned in National League by the anti-democratic thrust of the decision: in National League, the Court, in the name of protecting the States, invalidated laws enacted by Congress and signed by the President and indeed assumed for itself the power to invalidate any federal law which, in the Court's view, goes too far in the direction of undermining the Court's own view of the essentials of State sovereignty.

Justice Rehnquist made no attempt in National League to defend the approach to constitutional adjudication taken there, but in Nevada v. Hall, 440 U.S. 410 (1979), he offered such a defense. The issue in that case was whether, under the federal Constitution, the courts of one State lack jurisdiction over another State which is sued as a defendant. The majority answered that question in the negative because there is nothing in the Constitution which addresses a State court's jurisdiction over other States. Justice Rehnquist dissented, arguing against the "Court's literalism," id., at 434, and in favor of an entirely different analytical method of constitutional interpretation:

> Any document -- particularly a constitution -- is built on certain postulates or assumptions; it draws on shared experience and common understanding. On a certain level, that observation is obvious. Concepts such as "State" and "Bill of Attainder" are not defined in the Constitution and demand external referents. But on a more subtle plane, when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan -- the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning. [440 U.S. at 433.]

We have no quarrel with this statement of how to interpret the constitution. We disagree with National League because we believe Justice Rehnquist followed his personal views rather than the constitutional plan, and not because we challenge the legitimacy of interpreting the Constitution by reference to that "plan" or by reference to the

Constitution's "tacit postulates." Our point is simply this: Justice Rehnquist's statement of approach applies equally to cases in which individuals claim infringement of their rights and to cases in which the States claim infringement of their prerogatives. Yet Justice Rehnquist follows the approach of his *Nevada v. Hall* dissent *only* in States' rights individual rights cases.

Justice Rehnquist's decisions thus make clear that he is not following some neutral and principled method of constitutional adjudication but instead is interpreting the Constitution to further a particular ideological agenda, one that is hostile to federal power and indifferent to individual rights. In our view, Justice Rehnquist's unyielding commitment to that agenda -- an agenda that is incompatible with the "constitutional plan" and with the national welfare -- disqualifies him to be Chief Justice of the United States.

IV.

We turn now to the nomination of Judge Scalia and begin by underlining what we said at the outset: we do not at this point urge a particular answer to the question of whether Judge Scalia should be confirmed. Our reason for testifying is that, as we have stated, we believe, after a careful review of Judge Scalia's writings, that deeply troubling questions are raised by his writings, as we *read* them, on the role of the courts in interpreting the laws that Congress enacts, the role of the Executive in enforcing those laws, and the Constitution's office in limiting the power of Congress and the Executive alike. We discuss those questions in some detail in the hope that by so doing we will stimulate a probing examination of Judge Scalia by the Committee with respect to these matters.

A.

The first respect in which Judge Scalia's public statements give great pause is the theory he has outlined for deciding statutory cases -- cases involving the interpretation and application of legislative enactments. The longstanding and prevailing understanding of the judicial role in such cases is the one Judge Learned Hand expressed best and that the Supreme Court has embraced: the judicial task is to make the "best effort to reconstitute the gamut of values current at the time when the words [of the statute] were uttered,"[14] because "statutes have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[15] Stated more simply, the role of the judiciary is, as Justice Story put it, to arrive at that interpretation of a law "which carries into effect the true intent and object of the legislature in the enactment."[16]

Judge Scalia has a very different understanding. In two speeches that he submitted to this Committee, Judge Scalia takes issue with the proposition "that the intent of th[e legislative] body is what should govern the meaning of the law," and that "interpretative doubts . . . are to be resolved by judicial resort to an intention entertained by the lawmaking body at the time of its enactment."[17/] According to Judge Scalia, "asking what the legislators intended . . . is quite the wrong question."[18/] To him, "[s]tatutes should be interpreted . . . on the basis of what is the most probable meaning of the words of the enactment,"[19/] viz, "by assessing the meaning that would reasonably have been conveyed to a citizen at the time the law was enacted, as modified by the relationship of the statute to later enactments similarly interpreted."[20/]

In our view, this approach to statutory interpretation is flawed in at least two respects. First, as Justice Frankfurter argued, "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."[21/] Justice Frankfurter explained:

> A statute like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute . . . is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment -- that to which it gave rise as well as that which gave to it -- can yield its true meaning.[22/]

Second, the reality is that in most statutory cases the language of a statute is not so clear as to permit of only one possible interpretation or application; as Justice Frankfurter argued in another case, "[o]ne would have to be singularly unmindful of the treachery and versatility of our language" to harbor such a view.[23/] Indeed, "it would be extraordinary" if a case which could be decided by means of "mechanical application of Congress' words to the situation" were deemed "worthy of th[e Supreme] Court's attention."[24/]

It is precisely for this reason that Judge Scalia's approach is so unsettling. For what Judge Scalia ultimately argues is that it is neither possible nor proper to seek the construction that would produce the results Congress intended or the results most consonant with the congressional policies underlying the statute. Rather, Judge Scalia argues, where the language is "plain," it is to be controlling even if the result is not what Congress wanted. And even more importantly, in Judge Scalia's view, in the usual case in which there is some room to differ over the meaning of the words Congress has enacted, the executive and judicial branches are free to place their own gloss on statutes.

Insofar as Judge Scalia's argument rests on his belief that it is not possible to ascertain in a reliable fashion what Congress intended in passing a particular law, we believe he misunderstands the legislative process. To be sure, some of what passes for authoritative "legislative history" is not authoritative at all because it cannot be understood to be an expression of a judgment that Congress as a body made in enacting the law. But in our experience, it ordinarily *is* possible to gain valuable insight into what Congress intended and how far the Legislature was prepared to go in enacting a particular law by examining what those who sought enactment of a particular piece of legislation identified as the problem to be addressed; the statements of the principal proponents of the legislation, serving as spokesmen for the bill's supporters, as to what they sought (and equally important did not seek) to accomplish; the compromises that the proponents made during the legislative process in their attempt to build majority support; and the compromises and alternatives that the proponents rejected and on which they joined issue with the opponents. To use Judge Hand's words again, it is, we believe, possible to "reconstitute the gamut of values extant" when a statute was passed, and thus to interpret statutes in a manner that furthers those values.

Ultimately, however, Judge Scalia rejects that approach to statutory interpretation in principle. He believes, as he puts it, that "if the members of Congress do not specify, in the law they enact, all the details of its application, they must realize that someone else will have to 'fill in' those details. . . . [T]he theory of our system is that *de facto* delegation goes initially to the agency administering the law, and, ultimately, to the courts."[25] In other words, according to Judge Scalia, under "the doctrine of separation of powers . . . once a statute is enacted, its meaning is to be determined on the basis of its text by the Executive officers charged with its enforcement and the Judicial officers charged with its application."[26]

But while it is of course true that the Executive decides in the first instance what a law means -- there is no plausible way by which Congress can decide that question -- Judge Scalia's formulation begs the critical issue: *by what criteria* is the Executive (or the Judiciary) to make that decision. What Judge Scalia is arguing is that the Executive is free to interpret statutes -- in his words, to "fill in th[e] details" -- based on the Executive's own conception of sound policy and without regard to, rather than based on, its understanding of Congress' conception. And that reflects a profound disrespect for the legislative process and ultimately for Congress.

Judge Scalia invokes the rubric of separation of powers to defend his theory, but the view he espouses is the antithesis of that doctrine correctly understood, for his approach would lead to a consolidation of power in the Executive to make as well as to enforce national policy. The correct understanding of the separation of powers doctrine is the one expressed in the Steel Seizure Case:

> [T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to recommending of laws he thinks wise and vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.[27]

A true appreciation of the separation of powers principle thus leads directly to (and underlies) the prevailing approach to statutory interpretation -- an approach whose premise is, as Justice Holmes put it, that "the legislature has the power to decide what the policy of the law shall be" and which therefore concludes that if Congress "has intimated its will, however indirectly, that will should be recognized and obeyed."[28] Judge Scalia rejects Justice Holmes' conclusion because he rejects Holmes' premise.

The significance of the differences between the traditional understanding of the separation-of-powers doctrine as articulated by Holmes and the approach to statutory construction it yields, and the revolutionary views of Judge Scalia, cannot be overstated. Because so much of what Judge Scalia would be called upon to do, if elevated to the Supreme Court, would involve the construction of federal statutes as to which, of course, the Supreme Court has the final say, his approach has the potential to effect a vast shift of policy-making authority from the Congress to the President. That approach therefore warrants the most careful scrutiny by this Committee.

B.

Judge Scalia's premise as to the prerogatives of the President vis-a-vis Congress lead not only to an approach to statutory construction that would allow the President to make policy without regard to Congress' view but also to an approach to constitutional interpretation that would limit Congress' power even further and transfer even more policy-making authority to the Executive.

Consider, for example, Judge Scalia's approach to Article III of the Constitution. That Article states that the "judicial power" of the United States shall extend to "cases or controversies." Based on his view of the separation of powers, Judge Scalia would read into that Article a review that would preclude Congress from subjecting certain types of executive action to judicial review even where Congress concludes that such review is necessary to assure that the Executive faithfully executes the law. According to Judge Scalia, Congress may provide for judicial review of executive action only where those such actions produce "distinctive[]" harm to a particular individual[29], and not where the Executive acts in a way adverse "only to the society at large."[30]

What this means, in concrete terms, is illustrated by a recent dissent by Judge Scalia in a case challenging the Transportation Department's alleged failure to comply with Congress' directives to set fuel economy standards for automobiles at the level which achieves the maximum feasible economy. In that case, the majority (including incidentally former Senator, now Judge, Buckley) found that a citizens group had standing to challenge the Executive's asserted non-compliance with the law. But following his academic writings, Judge Scalia disagreed, arguing that even though Congress had authorized judicial review of the Executive's enforcement of that law at the behest of "[a]ny person who may be adversely affected" by what the Executive had done, no one could challenge the Transportation Department's action in allegedly setting too lax a standard. Judge Scalia contended that while the courts are always open to claims that the Executive has exceeded the bounds set by Congress in regulating the private sector because such regulatory action, by definition, inflicts distinctive harm on those regulated, it is his position that the courts cannot hear claims that the Executive has failed to regulate to the degree Congress mandated because the injury that flows from under-regulation, such as exposure to increased hazards, is one shared in common by all exposed to the hazard.[31] Stated in more general terms, when the overall public interest is at issue, Congress simply cannot, in Judge Scalia's view, constitutionally bind the President to enforce the laws through the usual means used in a democratic society; the only alternatives Judge Scalia would leave Congress are the use of such extraordinary means as "defunding" or impeachment.

Remarkably, Judge Scalia believes that granting standing in cases such as Center for Auto Safety would work a "judicial infringement upon the people's prerogative to have their elected representatives determine how laws that do not bear upon private rights shall be applied."[32] But of course the very claim in that case was that "the people "through their "elected representatives" in Congress had made such a decision by the law that was enacted and signed by the President. What was at issue in Center for Auto Safety, then, was whether the Executive could trump Congress' judgment as to the degree of regulation that is desirable or whether, instead, the Judiciary would compel the Executive to enforce Congress' law. In refusing to intervene, Judge Scalia failed to enforce true separation-of-powers principles but instead furthered his consolidation-of-powers notion under which the Executive may overrule the Legislature. To quote Judge Scalia's article:

> Does [my view] mean that so long as no minority interests are affected, "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?" Of course it does -- and a good thing too.[33]

Another way in which Judge Scalia's separation-of-powers theory leads him to a position that would enable the Executive to "los[e] or misdirect[] important legislative purposes" is his interpretation of the Appointments Clause, the clause authorizing the President to appoint executive officials.[34] Since the Supreme Court's decision in Humphrey's Executor v. United States, 295 U.S. 602 (1933), it has been generally understood that this clause does not preclude Congress from enacting laws that establish standards that the President must follow in removing Presidential appointees. On that basis, the constitutionality of the independent regulatory agencies Congress has established to insulate some regulators from the ebb-and-flow of politics -- agencies like the FTC, NLRB, FCC and SEC -- has gone unquestioned.

That Judge Scalia at least harbors doubts as to the constitutionality of independent regulatory agencies is clear from the per curiam opinion he either authored or joined in the Gramm-Rudman case[35] as well as from a paper he delivered to the Supreme Court Historical Society a year ago.[36] Judge Scalia has made clear that he views Humphrey's Executor as "an anomaly" and as not even settling the question whether the President may discharge a member of an independent agency for carrying out statutory responsibilities in a way with which the President disagrees.[37] Moreover, the opinion of the three-judge court in Synar v. United States indicates that Judge Scalia may view the separation-of-powers doctrine to require that all those responsible for regulating must serve at the pleasure of the President, and that therefore Congress lacks the power to enact a law prescribing removal standards for any executive office.[38] It is noteworthy that the Supreme Court affirmed the three-judge court in Synar on a different rationale: the Court found it unconstitutional to vest authority in an officer like the Comptroller General who is completely dependent upon Congress, and the Court did not decide whether it is unconstitutional to vest executive authority in an officer who is independent of the Executive; indeed, the Supreme Court went out of its way to disclaim any intent to "cast[] doubt on the status of independent agencies."[39]

C.

Thus far we have discussed the ways in which Judge Scalia's separation-of-powers theory would lead to the transfer of authority from Congress to the President and in that way threaten the primacy of Congress in making national policy. But Judge Scalia's theory threatens congressional primacy in one further and even more fundamental respect: in the name of the separation of powers, he seemingly would revive the discredited non-delegation doctrine, the doctrine which holds that the judiciary may invalidate any law which, in its view, contains too little specificity and vests too much authority in the Executive.

The non-delegation doctrine was used by the Supreme Court in the early 1930s to strike down New Deal legislation with which those "Nine Old Men" disagreed;[40/] it has not been used since. Yet in an article written shortly after the Supreme Court's decision in Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980), Judge Scalia expressed sympathy for Justice Rehnquist's opinion in that case which sought to resurrect the non-delegation doctrine in order to invalidate critical portions of the Occupational Safety and Health Act. Judge Scalia argued that "the unconstitutional delegation doctrine is worth hewing from the ice" and urged the Supreme Court to "mak[e] an example of one -- just one -- of the many enactments that appear to violate the [non-delegation] principle out of a hope that [t]he educational effect on Congress might well be substantial."[41/]

Judge Scalia understands that Congress will be unable to pass complex regulatory legislation of sufficient specificity to meet the requirements of Justice Rehnquist's Industrial Union Department opinion. Thus, the necessary effect -- if not the intent -- of this application of separation-of-powers doctrine would be precisely what it was fifty years ago: to thwart the enactment of broad regulatory laws whose substance is anathema to a majority of the court hearing the case.

D.

In sum, there is grave reason to doubt whether Judge Scalia, if confirmed, would respect Congress' lawmaking powers or whether he would, instead, invalidate some laws as too vague and allow the Executive to nullify other laws by enforcing those laws in a manner that disregards Congress' will. Judge Scalia's views in these respects thus merit the most careful scrutiny before Congress decides whether to give its consent to this nomination.

V.

Judge Scalia's approach to constitutional adjudication in the separation-of-powers arena stands in marked contrast to his approach where individual constitutional rights are at stake. The meaning and the role of the Bill of Rights is the final area in which we believe Judge Scalia's nomination raises serious questions.

Starting from the premise that the Bill of Rights is "an embodiment of the fundamental beliefs of our society,"[42/] Judge Scalia believes that the appropriate judicial role is "not to 'give' it content but wherever possible to discern its content in the traditions and understandings of the nation."[43] The Bill of Rights "is an invitation, in other words, for the courts to behave in the old-fashioned, common-law mode."[44] Judge Scalia faults the courts for going further and finding "commands . . . within the Constitution, even though supported by no broad contemporary consensus and even though contrary to the longstanding historical practice."[45] Indeed, to Judge Scalia

> [I]t would seem . . . a contradiction in terms to suggest that a state practice engaged in, and widely regarded as legitimate, from the early days of the Republic down to the present time, is unconstitutional. I do not care how analytically consistent with analogous precedents such a holding might be . . . If it contradicts a long and consistent understanding of the society . . . it is quite simply wrong.[46]

To characterize the Constitution in these terms is to deny its most enduring significance. Indeed, Judge Scalia acknowledges that in his view "[t]o some degree, a constitutional guarantee is like a commercial loan; you can only get it if, at the time, you don't really need it. The most important, enduring and stable portions of the Constitution represent such a deep social consensus that one suspects that if they were entirely eliminated, very little would change."[47]

It is difficult to understand how Brown v. Board of Education, 347 U.S. 483 (1954), is to be justified in principle if the constitutionality of a practice were established by the mere fact that the practice is longstanding and widely viewed as legitimate; certainly racial segregation in the schools met those criteria as of 1954. Similarly, under Judge Scalia's approach, decisions holding sex discrimination to violate the Equal Protection Clause, and decisions treating libel laws as posing First Amendment issues or apportionment laws as posing Equal Protection questions, all would have been plainly erroneous when rendered.

Each of these obvious examples demonstrates that there are times -- important times -- in which the precise office of the Bill of Rights is to challenge custom and challenge the "contemporary consensus" in order to vindicate the ideals of the Constitution, ideals from which it is all too easy and tempting to depart at any given time. To deny this truth is to drain the Bill of Rights of much of its significance.

Closely related to Judge Scalia's cramped view of the Bill of Rights is his theory of the limited role courts should play in remedying constitutional violations. Judge Scalia seemingly believes that a court should not "apply any remedy which require[] it to conduct continuing supervision of the parties' activities;" on that basis Judge Scalia faults the courts because they "have become deeply involved in day-to-day management of public school systems, prisons, and state and mental insitutions, in order to assure what they consider an adequate remedying of past constitutional violations."[48] But if there is one lesson to be learned from the thirty-year history of implementing the decision in Brown v. Board of Education it is that there are times when judicial "supervision of the parties' activities" is essential if constitutional violations are to be cured. To deny the courts that power, as Judge Scalia seemingly would do, is to allow constitutional wrongdoing to persist and thus to vitiate the Constitution's force.

In other areas of constitutional law, Judge Scalia is not nearly so constrained in his judicial approach. When it comes to matters of individual liberty, Judge Scalia urges "judicial restraint in the creation of new rights."[49] But just as Justice Rehnquist has been anything but restrained in creating "new rights" in the States, so, too, Judge Scalia is not at all restrained in using the separation of powers rubric to create "new rights."

The decision in INS v. Chadha, 462 U.S. 919 (1983), for example, invalidating the legislative veto -- a decision whose result Judge Scalia championed[50] -- is an act of heroic judicial activism that invalidated over one hundred federal laws, enacted over a fifty-year period, and did so by crafting a new constitutional limitation. Similarly, as we have seen, Judge Scalia appears inclined to hold laws creating independent regulatory agencies to be unconstitutional, notwithstanding the fact that such laws date to the turn of the century, that the popular branches have repeatedly followed this course, and that there is nothing in the Constitution which, in terms, makes such agencies unlawful. And, as noted, Judge Scalia has spoken warmly of the non-delegation doctrine, a doctrine that also has no explicitly constitutional base and that, if resurrected, would necessarily confer on the judiciary a roving commission to invalidate any law that judges found to be too vague.

The short of the matter is simply this. As with Justice Rehnquist, the slogan Judge Scalia offers to rationalize his restricted approach to construing and enforcing the Bill of Rights is refuted by the very approach he applies in other areas of constitutional jurisprudence. And once that slogan is stripped away, there is no escape from the deep disquiet that result from Judge Scalia's analogy of the Bill of Rights to a commercial bank loan, or to the common law, or from Judge Scalia's railings against decisions which are right in constitutional principle but are "supported by no broad contemporary consensus" and "contrary to longstanding historical practice." Here, too, then, we urge the Committee to probe deeply and question sharply, with respect to the philosophy Judge Scalia brings to the task of judging cases arising under the Bill of Rights.

* * *

We submit that the Congress should not confirm a nominee to the Supreme Court of the United States unless satisfied that the perspective Justice is committed to carrying out congressional will in statutory cases, to allowing Congress its primacy in making national policy, and to vindicating the values of the Bill of Rights in constitutional cases. For the reasons we have discussed, Judge Scalia's writings leave grave doubt as to whether he is so committed. Like this Committee, we will resolve those doubts and base our final judgment on his nomination on the record this Committee develops in the course of these hearings.

FOOTNOTES

[1] Black, A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657, 658 (1970).

[2] The Federalist No. 76, p. 386, (Bantam 1982).

[3] Rees, Questions for Supreme Court Nominees at Confirmation Hearings, 7 Tex L Rev 9;13, 945 (1983).

[4] 9 R. Mersky & J. Jacobstein, The Supreme Court of the United States Nominations 1916-72 at 180 (1975).

[5] Rehnquist, The Making of a Supreme Court Justice, The Harvard Record (Oct. 8, 1959) p. 7.

[6] Black, supra n. 1, at 663-64.

[7] The Federalist No. 76 supra n. 2.

[8] Black, supra n. 1, at 658.

[9] Eg., Sugarman v. Dougall, 413 U.S. 634 (1973) (dissenting opinion).

[10] Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 572 (1975) (dissenting opinion).

[11] Wallace v. Jaffree, __ U.S. __, 53 L.W. 4465 (1985).

[12] See Fry v. United States, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting).

[13] Eg., Bouds v. Smith, 430 U.S. 817, 840 (1977) (Rehnquist, J., dissenting).

[14] Woodwork Manufacturers v. NLRB, 386 U.S. 612, 620 (1967), quoting a letter by Judge Hand to Justice Frankfurter.

[15] Watt v. Alaska, 451 U.S. 259, 266 (1981), quoting Cabell v. Markham, 148 F. 2d 737, (2d Cir. 1945) (L. Hand, J.), aff'd, 326 U.S. 404.

[16] Minor v. Mechanics' Bank, 1 Pet. 46, 64.

[17] Speech on Use of Legislative History at 5, 15.

[18] Speech on Original Intention at 2.

[19] Id.

[20] Speech on Use of Legislative History at 15.

21/ *United States v. Moria*, 317 U.S. 424, 431 (1943) (dissenting opinion).

22/ *Id.*

23/ *Sullivan v. Rehimer*, 363 U.S. 335, 352 (1960) (dissenting opinion).

24/ *Id.* at 359.

25/ Uses of Legislative History at 8.

26/ *Id.* at 15-16.

27/ *Youngstown Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

28/ *Johnson v. U.S.*, 163 F. 30, 32.

29/ Scalia, *The Doctrine of Standing As An Essential Element of the Separation of Powers*, 17 Suffolk L. Rev. 881, 894 (1983).

30/ *Center for Auto Safety v. NHTSA*, __ F.2d __, No. 85-1231 (D.C. Cir. June 20, 1986) (Scalia, J, dissenting).

31/ *Id.*

32/ *Id.*

33/ *The Doctrine of Standing*, *supra*, at 897 (emphasis added).

34/ Art. II, Sect. 2, clause 2.

35/ *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986), *aff'd on other grounds*, __ U.S. __, 54 L.W. 5064 (July 7, 1986).

36/ Scalia, *Historical Anomalies of Administrative Law*, 1985 Sup. Ct. Hist. Soc. Y.B. 103, 106-10.

37/ *Id.*

38/ *See* 626 F. Supp. at 1398-99.

39/ 54 L.W. at 5006-08 & n. 4.

40/ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

41/ Scalia, *A Note on the Benzene Case*, REGULATION, July-Aug. 1980, at 25, 28.

42/ Scalia, *The Judges are Coming*, reprinted in 126 Cong. Rec. 18920, 18972 (1980).

43/ *Id.*

44/ *Id.*

45/ *Id.* at 18921.

46/ *Id.* at 18922.

47/ Scalia, *Economic Affairs as Human Affairs*, CATO Journal 703, 708 (1985).

48/ *The Judges are Coming*, *supra*, at 18921.

49/ *The Judges are Coming*, *supra*, at 18921.

50/ *Eg.*, Scalia, *The Legislative Veto: A False Remedy for System Overload*, REGULATION, Nov.-Dec. 1979, at 19.

Senator MATHIAS. Mr. Rauh.

STATEMENT OF JOSEPH L. RAUH

Mr. RAUH. My name is Joseph L. Rauh, Jr. I appear here this afternoon on behalf of the Americans For Democratic Action and the Leadership Conference on Civil Rights. Mr. Kerr, who was to appear and whose statement is submitted for the record, is unavoidably detained in Pittsburgh.

The Leadership Conference, as Senator Mathias so well knows, is made up of the leading civil rights groups—blacks, Hispanics, women, et cetera—and I speak for them. A few groups do not take positions, but all who do take positions are opposed to Judge Scalia.

I have a preliminary point, sir. I think this committee is out of order. There is no vacancy for which Judge Scalia is being proposed. I know what the trick is. The trick is to make it look to the public as though the Rehnquist confirmation is obvious. But I think after what happened here last week, it is perfectly clear that there is a real question whether Mr. Rehnquist will be confirmed. If he is not confirmed, there is no vacancy.

I think the idea of going ahead with a confirmation of this kind, with a hearing of this kind, for a job for which there is no vacancy, is a terrible mistake.

As far as using my 3 minutes is concerned, I would simply like to say that I think the prestigious prelunch panel proved the case against their own arguments. They answered a question which I thought was a very good question from one of the members of the committee: What is the difference between Scalia and Rehnquist? All you got out of them was no difference.

Well, then, if the decision of the Senate is against Rehnquist, as I hope and trust it will be, I think they made the case against Scalia.

Mr. Kerr makes a very good point in his statement being submitted, in which he says: "Judge Scalia believes in all checks and no balances." If you took his theory, you would still have Plessy against Ferguson; you would not have the *Gideon* case; you would not have Mapp against Ohio; you would not have Loving against Virginia. You would not really have any of the great advances that were made, because, he says, if we have gone on a certain course in society, if we have gone on a certain way, you do not change that until society changes. I do not think that is the way the Constitution is to be read. I have never seen a situation where a judge threw himself, out in the open as clearly, and it is all in the record of this hearing, as Mr. Gold said. Look at this. Look at this record. There is only one way you can decide, and that is that neither Rehnquist nor Scalia should be confirmed.

Thank you. I see my time is up.

[Prepared statement of Mr. Thomas M. Kerr submitted by Mr. Rauh follows:]

TESTIMONY ON THE NOMINATION OF ANTONIN SCALIA
TO THE UNITED STATES SUPREME COURT

August 6, 1986

SUBMITTED BY

THOMAS M. KERR

EXECUTIVE COMMITTEE CHAIRPERSON

AMERICANS FOR DEMOCRATIC ACTION

My name is Thomas M. Kerr. I am chairperson of the National Executive Committee of Americans for Democratic Action. I am a lawyer in Pittsburgh, Pennsylvania and I am a law teacher at Carnegie-Mellon University and the University of Pittsburgh and the Duquesne University School of Law.

The views I express here are those of Americans for Democratic Action and they are my own. (They are not necessarily the views of my law firm or of the universities where I teach.)

ADA is a national public policy organization. Our decision to oppose Justice Scalia was made by the National Executive Committee as a result of concerns expressed below. While I could not, because of a scheduling conflict, appear in person, we are grateful to the committee for this opportunity to submit testimony.

Americans for Democratic Action respectfully urges this committee to deny consent to the appointment of Judge Antonin Scalia to the U.S. Supreme Court.

The present Administration has repeatedly made appointments to important offices of persons who were not expected to carry out the tasks of those offices -- of persons who had expressed their opposition to the purposes of those offices. Appointments to the Legal Services Corporation have been persons known to be opposed to funding legal services to the indigent. The Assistant Attorney General appointed to the Anti-trust Division have gutted restrictive trade practices enforcement. Look at the Civil Rights Division; look at the U.S. Commission on Civil Rights; look at the EPA, NLRB, etc., etc.

We suggest that you consider whether the appointment of Judge Scalia is also such an appointment -- this time to the highest office in the Judicial branch.

We direct your attention to Dr. Scalia's expression of his own philosophy of jurisprudence which was published in the Congressional Record, July 21, 1980, Extension of Remarks, on page 18920-922. (We inquired and were informed that this is available to you in your record already.) This is an extended expression of philosophy which then Professor Scalia had published in 1980 in Panhandle magazine, house organ of the Panhandle Eastern Pipe Line Co.

We suggest you read his views in toto, alongside Federalist Paper #10 of James Madison, alongside DeToqueville, (especially respecting the "tyranny of the majority"), and alongside the Constitution itself.

Judge Scalia reveals a fundamental misinterpretation of the "separation of powers" -- of the system of "checks and balances." **Specifically, he is all for the "checks" but excludes any consideration of the "balances".** For instance, he writes:

> It would seem to me a contradiction in terms to suggest that a state practice engaged in, and widely regarded as legitimate, from the early days of the Republic down to the present time, is "unconstitutional." I do not care how analytically consistent with analogous precedents such a holding might be, nor how socially desirable in the judges' view. If it contradicts a long and continuing understanding of the society--as many of the Supreme Court's recent constitutional decisions referred to earlier in fact do--it is quite simply wrong.

Application of this fiat would have upheld Plessy v. Ferguson rather than provide the liberating rule of Brown; would have continued to deny assistance of legal counsel to indigent accused rather than provide the fundamental fairness of Gideon v. Wainwright; would have encouraged the police of the states to continue to enter our homes and seize our property, rather than provide the protection of Mapp v. Ohio; would have upheld the practice in some states, and widely regarded as legitimate there as late as the 1960's, to punish interracial marriage as a crime, rather than provide the understanding of privacy, dignity and individual choice of Loving v. Virginia; would have sanctioned continuation of state practices in law discriminating against jurors, or administration of estates, or otherwise enjoying the equal protection of the laws, rather than admit women to equality* as the U.S. Supreme Court did in 1971 in Reed v. Reed.

The separation of the powers of government provided in our Constitution was designed to prevent any single entity to possess all, or excessive, power -- we had enough of monarchy. Professor Scalia's thesis would limit judicial power, questions the wisdom of extended legislative activity, and appears to defer greater power to the Executive. This is the separation askew!

Madison, in The Federalist, on the other hand, perceived an essential that there always be some opportunity to redress for each of the "factions" that would inevitably arise in our society.

The equitable "balances" would be provided by the availability of recognition and relief upon application to one of the branches whenever another was closed to the faction's

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***Judge Scalia has demonstrated insensitivity to considerations of women's equality.**

In March 1980 the United States Judicial Conference, the governing body of the federal judiciary, endorsed the principle that "it is inappropriate for a judge to hold membership in an organization which practices invidious discrimination."

Judge Scalia joined the Cosmos Club in 1971. The Club discriminates against women in its membership and access. Several unsuccessful attempts have been made to change this policy.

Justice Scalia was apparently not asked about his membership when he was first nominated in 1982. He did not resign from the Cosmos Club until December 1985 -- 3 months after Senator Paul Simon insisted that then nominee Lawerence Silberman resign from the Cosmos.

interest. Let us illustrate: when labor sought redress from the imbalance of power as between themselves and large corporate employers they found the judiciary closed to them -- unsympathetic judges issued and upheld injunctions. So labor found redress by applying to another power -- the legislature (states, workmen's compensation, safety, etc.). When the black minority sought redress from the terrible collection of oppressive racist laws they found legislatures closed to them(continuing Jim Crow laws; Congress refused for 40 years to enact anti-lynching laws), so they found redress in another branch, the judiciary, the only branch open to them at the time. The legislatures ignored the interests of blacks, but were amenable to the concerns of labor; the judiciary discouraged the interests of labor, but were amenable to the concerns of blacks. Each faction found a branch helpful to them. And so it should be for the as yet unknown "factions" in our near or distant future.

It is contrary to this ideal social contract to diminish the power of any of the branches or excessively concentrate power in just one of them. But we suggest that this is precisely the objective of Judge Scalia's jurisprudence.

Also, a civilized society must consider the interest of the individual or the few, protecting them from the "tyranny of majority". In his article Professor Scalia complains "Public schools cannot begin the day with voluntary nondenominational prayer...No crime can carry a mandatory death penalty. Abortion cannot be prohibited by law. Public high school students cannot be prevented from wearing symbols of political protest to class...Adolescents must be allowed to purchase contraceptives without their parent's consent..." He makes it clear that he deplores these holdings. But these are concerns of [different] minorities. These interests, as against those of the powerful present majority, must be especially assigned to the courts, rather than the elected branches, for protection.

In an excellent article in District Lawyer, September 1985(written and published before these appointments), Circuit Judge Abner J. Mikva said:

> "A President may certainly nominate judges who share his world view. What a President may not do is use the nomination process as a means to amend the Constitution or recast important constitutional precedents. A President may want judges who start out sharing his values. What he ought not seek is judges who forget or are willing to forego the anti-majoritarian purpose of the Bill of Rights."

We agree with this and respectfully submit that this proposed appointment does seek to recast constitutional precedents, does propose a Justice willing to forego the anti-majoritarian purpose of the Bill of Rights, and that therefore the Senate should not consent.

Senator MATHIAS. Thank you very much, Mr. Rauh.

Let me start with Ms. Smeal. You quoted from a lecture that Judge Scalia had given, that it was "an embarrassment" to teach on the subject of affirmative action.

Do you know the date of that lecture?

Ms. SMEAL. It is 1979, I believe—yes, the winter of 1979. At least, it appeared in the Law Quarterly at that date.

Senator MATHIAS. That was prior to the recent decision in which Justice O'Connor noted that the Court had reached a consensus in this area.

Ms. SMEAL. Yes.

Senator MATHIAS. Won't that affect the situation? Won't this new "consensus" be articulated in a very strong way to sustain the doctrine of affirmative action?

Ms. SMEAL. Well, I noticed, sir, that I think it was you, Senator, who asked him this question yesterday, or at least Judge Scalia was asked the question about the new consensus that was articulated by Judge O'Connor. And essentially what he said was that he did not answer. He did not assume that there was a new consensus, nor did he assume that whatever the new consensus for would be affirmed. He said it would depend on what five judges would say.

Essentially from his writings, I would have to say that I think that he will not be a person supporting a strong consensus for affirmative action. I think that he will try to find every loophole.

You do not have to find this just in his writings such as a Law Journal article like this; you can look at his own court cases. I admit there are not many of them, but he talks about intent; he talks about is there intent to discriminate on the basis of race. And essentially I think my ears are very attuned to the words of the opponents of affirmative action. Those who are opposed now want us to say that there really is not discrimination unless there is an intent to discriminate, a motive.

And when you go down that path, you really are not going to see much discrimination. You are going to only be able to see it when it bites you in the nose. And yet, even in some cases where I would say that it was naked discrimination—I cite another case where a woman was totally segregated in her workplace et cetera—he did not see this as really apparent discrimination.

So I would say from his interpretation of the cases and his views on affirmative action that he will be a part of that consensus narrowing it. And let us face it, the decisions on affirmative action, some parts of them have been very close, 5-to-4 decisions. And so I think that he could indeed cast a vote against that would be decisive.

Senator MATHIAS. Mr. Rauh, you said the prelunch panel had come to the conclusion that there is very little difference between Justice Rehnquist and Judge Scalia. Without challenging either you or them, let me suggest that for the purposes of the confirmation hearing, it might be more interesting for the committee to speculate about the difference between Judge Scalia and the departing member of the Court, Chief Justice Burger.

What differences do you see there?

Mr. **Rauh**. May I first say that one of the members of the prelunch panel spoke of you and what you had done, and I felt remiss that I had not done that when I testified last week.

I can think of no one that the civil rights movement is going to miss more, or that I will personally miss more, than you, Senator Mathias. You and Clarence Mitchell and I go back a long way together—I guess I go back the longest way—and I do not know of anyone who has done as much for the cause of civil rights as you have. At times, I wonder, heavens, what courage it took. You were not in a State where the minorities were such a big part, but in a State with southern tradition. That you should have been able to accomplish what you have is remarkable and I personally want to thank you from the bottom of my heart.

Senator **Mathias**. You are extremely generous, and I appreciate it. I appreciate those sentiments all the more because I know they are not unanimous. [Laughter.]

Mr. **Rauh**. With respect to a comparison of Judge Scalia and Chief Justice Burger, I would say there will be a significant drift to the right as a result of that change. Justice Burger really only dealt with the interstices of the matter when he dealt with one of the Warren advances. In other words, Justice Burger did not try to reverse much of the Warren court. There were times when he nibbled at it. I am not saying that Justice Burger does not have some pretty bad decisions. But they are not a head-on collision with the Warren court. I think Judge Scalia is going to take a head-on collision course for the things he wants to change.

Furthermore, one should say of Justice Burger that there are some things there that are great advances. Many people have referred to the abortion decision as a great advance on the civil rights front, but I will not go into that, as that happens to be an issue on which the Leadership Conference does not have a position. We are a coalition of 185 organizations, and some of the Catholic groups do not agree with the majority in that respect.

But you have the busing case, at Charlotte-Mecklenburg. That was a tremendous advance for civil rights. He has seen both sides on affirmative action. It illustrates the point I am making, that he was not trying to upset what the Warren court did. He simply on occasion drew it back a bit.

I think the shift of Scalia for Burger is going to have a real major effect. Now, one may say, well, you have to wait for one more justice, and so forth. I do not know whether that is true. Some of the 5-to-4 decisions where Burger was on the liberal side may go.

This is a very serious thing that is being considered here in regard to Judge Scalia, and I agree with you that from the point of view of the long run of the court, the substitution of Scalia for Burger is probably a greater right-wing swing than the substitution of Rehnquist in the Chief Judge spot for Chief Judge Burger.

Senator **Mathias**. Would you like to comment on that, Mr. Gold?

Mr. **Gold**. Yes, thank you, Senator.

To judge him from his writings in periodicals—his judicial opinions are not that numerous, and as a junior member of the D.C. Circuit, he seems to have drawn his fair share of the less enviable assignments in opinionwriting—that Judge Scalia is a much more doctrinaire person than Chief Justice Burger has shown himself to be.

I am uncomfortable with treating both what I would call the questions concerning the allocation of power between the different branches of the Government and the questions concerning the Bill of Rights as conservative—liberal issues of left-right issues. On the questions concerning the role of Congress, it seems to me, as we note in our testimony, that Judge Scalia promises to be a more wrong-headed judge than Chief Justice Burger ever was. Again, while we have very little information on how he would view the Constitution in terms of his judicial writings, what we do know suggests that Judge Scalia takes an extremely skeptical view of judicial enforcement of the basic guarantees of the Bill of Rights.

The one point, and probably the only point, I agree with the distinguished panel which preceded us on is that if you judge from the secondary writings, Judge Scalia's decisions concerning the Bill of Rights are apt to look very, very much like Justice Rehnquist's over the past 15 years—in other words, decisions taking a more limited view of those guarantees than the average of a group of jurists who overall take a very limited view. And in those terms we were very disappointed to hear what we did hear of yesterday's testimony. It was our hope and continues to be our hope, that this committee will be able to ascertain more about Judge Scalia's overall approach on Bill of Rights questions. Right now we do not know much, and what we do know is most disconcerting.

Ms. SMEAL. I just wanted to throw in—in the area of sex discrimination, he would be definitely a move to the right from Burger. For example, in that sexual harassment case that was just decided, part of it was a 5-to-4 decision on whether the person should be strictly liable. According to Judge Scalia's interpretation of the decision at the lower level, he would have had no liability on this case for an employer, which would have been narrowing title VII even more.

And on individual rights, what he keeps saying is that he thinks the Court should not invent any right, and what rights are to him is what the majority says they are, or whether there is a consensus about a right. And if we have to depend on consensus for rights for women, we have a long way to go. And then he even modifies it and says it either has to be a current consensus or a past consensus.

Well, obviously, we cannot look to past history for consensus for equality for women—and what does he call a consensus? What percentage? Majority? Much more than majority? According to the dictionary, it means almost everyone.

So I think he would be definitely narrowing the rights. And of course, the right to privacy, he has disparaged. He has said that he would not be for it. And of course, Burger did vote for *Roe* v. *Wade*.

Senator MATHIAS. Well, I thank all of you for being with us.

Mr. RAUH. Senator, some of the Democratic Senators had indicated they did want to question us.

Senator MATHIAS. I was just about to address that problem.

Mr. RAUH. Thank you, sir.

Senator **Mathias**. I have just been advised that there are some developments in the Senate which have delayed other members of the committee.

First of all, let me say that your written statements will all be included in the record as if read.

We will keep the record open, because all Senators from both sides who have been delayed and unable to be here may have questions. We can propound those questions to you in writing, or we can call you back as the need may be, and subject to your availability.

Mr. **Rauh**. Can we remain here in the hope that we would be heard further after the vote? I understand there is a cloture vote at 2; is that right, sir?

Senator **Mathias**. Well, that is apparently being delayed, but that is one of the uncertainties of this moment.

I suggest that we take a 45-minute recess, at which time we will resume. If you are able to stay, and if there are questions for you, you can address them then.

Mr. **Rauh**. I have talked to the two panelists, and they will stay.

Senator **Mathias**. We will stand in recess for 45 minutes.

[Recess.]

Senator **Grassley** [presiding]. The hearing of the Committee on the Judiciary will reconvene. And at the adjournment, or at the recess, there was a suggestion that other members may want to ask panel two questions.

On the Democrats' side are there members desiring to ask questions of panel too? If so, we will call them back.

Senator **Metzenbaum**. Panel 2 was——

Senator **Grassley**. Smeal, Gold, and Rauh.

Senator **Simon**. Mr. Chairman, I would just have one question.

Senator **Grassley**. Allright then panel 2 will come back to the table.

And staff advises the panel that they are still under oath. We will go to the Senator from Illinois.

Senator **Simon**. Forgive me for not being here. Larry Gold, I guess I am directing this question to you.

The position of the AFL–CIO on both nominees.

Mr. **Gold**. Senator, in the testimony we filed we outline our position, and it is the following:

First of all, we oppose the nomination of Justice Rehnquist to be Chief Justice. We opposed his nomination to be an Associate Justice, and 15 years on the Court have unfortunately confirmed that we were right in opposing him at that time.

We opposed him primarily because his record on individual rights is one of the most negative and unforthcoming of any judge in recent memory.

With regard to Judge Scalia, we have posed a series of questions. His judicial record is so much shorter than Justice Rehnquist's, his writings are so relatively sparse that we are not yet prepared to take a position. We do hope that the committee will explore those questions. As I did in my statement, I want to particularly underline our intense concern about Judge Scalia's stated positions with regard to the relative power of Congress to make national policy.

We find his views on statutory construction, on the freedom of the executive branch to disregard congressional intent, on standing—particularly with regard to challenges to the nonenforcement of broadly phrased congressional acts by the executive, on the nondelegation doctrine and his rejection, so far as we can judge from his writings, of congressional power to set up independent agencies and otherwise to control the executive branch to assure fair and effective enforcement of congressional action, to be all part of a piece which tends to shift power to the Executive, to limit Congress' power, and to make it extraordinarily difficult for Congress to act effectively to regulate the myriad of things, particularly in the economic life of the country that need to be regulated in the public interest.

If Congress is not willing to protect its own prerogatives in this regard, nobody will. And to the extent that the appointment power is used by the President to affect the balance of power between the legislative and the executive branch, we look to this committee to satisfy itself that either we are wrong or not to confirm this nominee.

In that regard I want to say that our position in no way is one without self interest. The labor movement has attempted to make its way by lobbying, by political action, by making arguments to the popular branches. We are content overall, against a background of a Bill of Rights, to proceed in that way. We do not believe that Congress' authority in the areas not covered by the Bill of Rights ought to be ceded to the executive branch.

We press these views on all members of the committee, both the Republican members and the Democrats, the conservatives and the liberals, because we think these balance-of-power issues are not ones which divide the Congress in the same way that certain of the other issues that judicial nominations raise may do.

Senator SIMON. I thank you.

I might add for the members of the committee that I have received a letter from Justice Rehnquist informing me that he has resigned from the Alfalfa Club.

Senator GRASSLEY. The Senator from Ohio.

Senator METZENBAUM. Mr. Chairman, I just have a couple of questions. I was not here earlier when Ms. Smeal testified. NOW, I understand, opposes the confirmation of Judge Scalia?

Ms. SMEAL. Yes, I am speaking for NOW and the National Women's Political Caucus, also.

Senator METZENBAUM. And which group?

Ms. SMEAL. The National Women's Political Caucus.

Senator METZENBAUM. And do you find acceptable the distinction that the judge made between discrimination against women, that which is described by the American Bar Association as invidious discrimination?

Does it make you and your members feel better if it is not invidious, just plain, good old——

Ms. SMEAL. I am so glad you asked the question of me. Obviously, his statement about the Cosmos Club, that he did not think that it was a club that engaged in invidious discrimination when it totally excludes women is distressing and upsetting.

But I personally think it reflects what he has written on the subject of sex discrimination. Essentially, he does not view it as strongly as he does on race, and on race discrimiation he is disparaging.

There is a lot of ridicule and hostility, but really a lot of joking around about the remedial solutions that are—I think it is more demeaning when you joke. In the decision on sexual harassment, he does not see it as sex discrimination or as something that a lawyer would have any liability on. Because it is personal.

Well, if all sex discrimination could be looked at as personal, and in this position, he has the most extreme position. Because even the Court—he did not view it as a form of discrimination at all. And 9 to 0 they did now.

But on liability, he has a position that was not even voiced.

So I would, it was upsetting. How could anybody say it was not an unfair form of discrimination or harmful form or invidious that you exclude women simply because they are women, in this day and age.

Senator METZENBAUM. Mr. Rauh, you are appearing on behalf of——

Mr. RAUH. I appear this afternoon, sir, on behalf of the Americans for Democratic Action and the Leadership Conference on Civil Rights.

I spoke for both when I said that we feel very strongly that the shift to the right that Judge Scalia would mean over Chief Justice Burger would make a very tremendous difference.

I guess if I had to put it in a simple sentence, I would say: Judge Scalia has ice water in his veins, when a Supreme Court Justice ought to have a feeling of compassion.

He makes jokes—Ms. Smeal made that point too—he makes jokes about things we believe in deeply. He laughs at affirmative action. That has been quoted in the record here.

I cannot understand putting on the Supreme Court someone who laughs at affirmative action. I am not saying I am right, that you have to do everything I want on affirmative action. I am saying it is a serious problem.

How do we remedy past wrongs that have been done women and blacks and Hispanics? That is a serious problem that ought to be discussed.

Judge Scalia, as a professor, laughed at that problem. I say, he is not qualified to be on the Supreme Court.

Senator METZENBAUM. Does the Leadership Conference take a position for or against Judge Scalia's confirmation?

Mr. RAUH. The Leadership Conference voted unanimously in its executive session to oppose both Justice Rehnquist and Judge Scalia.

Senator METZENBAUM. Mr. Gold, I read your statement, which I read to indicate, maybe. You say: "Like this committee, we will resolve these doubts and base our final judgment on his nomination on the record that this committee develops in the course of these hearings."

We have now heard from Judge Scalia. The rest of the witnesses are either pro or con. They will indicate their positions. There will probably be no great surprises.

But the inquiry concerning Judge Scalia himself is now concluded.

On the basis of that, how does the AFL-CIO vote?

Mr. GOLD. I have to admit to you, Senator Metzenbaum, that yesterday the AFL-CIO Executive Council was meeting and we were tending to the business of that meeting, which comes once every quarter.

I have not had an opportunity to review the transcript or to see the television tapes. I only know what I heard this morning from Senators DeConcini and Heflin, and it does not sound as if Judge Scalia was very forthcoming in responding to inquiries on his position.

Senator METZENBAUM. Neither are you. I do not know what you are saying. You are saying that there are lots of problems, but we cannot vote maybe. And I think that when your views—you think they are important enough to come up here and testify. I think that if the AFL-CIO or any other group comes before us, you just cannot say, we are concerned; now it is your baby. Because without taking a position, I do not find——

Mr. GOLD. Senator, first of all, I never despair about the possibility of reasoned discussion. And second, we have no intention of taking no position. We want to know more than we know now before we take a position; and I am never ashamed of proceeding in that way.

Senator METZENBAUM. Well, I would hope that before this matter comes to the floor, at a very minimum, that if you have a position, you share it with us, and not to wring your hands in dismay after that decision has been arrived at.

Mr. GOLD. We have never been shy at stating our views, and there is not enough time with all of the things that are going on to wring one's hands.

Senator METZENBAUM. Thank you.

Senator GRASSLEY. Senator Biden.

Senator BIDEN. Thank you.

A question for all three of you. Yesterday, Judge Scalia indicated, as he put it, and I quote, "he has no fully framed omnibus view of the Constitution; that he is not committed to any particular agenda on the Court; and that he would recuse himself if he felt so strongly on a moral or personal basis that he could not rule impartially."

How do you square these comments with your assessment of Judge Scalia?

Ms. SMEAL. I find it very difficult. I mean, the Judge is a professor. He has, I would say, in my humble opinion, a well-developed view of the Constitution. I do not happen to agree with it, but it is certainly developed. He has written about it.

His notion about individual rights, that they must be based on a consensus, either a present consensus or a past consensus, I feel just fly in the face of everything we know about individual rights and the pursuit of them, in the history, the 200-year history of our country.

I do not understand how he thinks we could have fought racial discrimination if we had to wait for a consensus. I do not understand how we are ever going to fight successfully any form of discrimination if we have to wait for consensus.

He uses his words very, very carefully. He also has an idea that essentially what rights are are what the majority says. Democracy, I think he referred to it again yesterday. But I view, and I think that those of us fighting for elimination of discrimination, that there are certain guarantees and rights under the Constitution that are not according to the whim of what the majority might be at a given time.

So anyway, I think he has a very well-developed view.

As far as about recusing himself, if you notice, when he was asked questions on abortion or *Roe* v. *Wade,* he did not say he would recuse himself. He said he did not have an opinion on this, but in my view of his writings, he was very critical of the *Roe* v. *Wade* decision.

Senator **Biden**. On its substance or its logic? Because I have reviewed his writings, too. And I could not find that. It would be very helpful to me if you could point that out to me—I do not mean to put you on the spot. You do not have to do it now, but before we close this vote out. As I reviewed his writings, there was not any particular place where he argued or he said, that *Roe* v. *Wade* was in fact incorrectly decided.

It is in fact pretty—now, there may be someplace where he said that, but I would like to know.

And second, there is an overwhelming universal criticism by proponents of prochoice and opponents of prochoice that *Roe* v. *Wade* was not a very well reasoned decision. Most constitutional scholars do not offer that as an example, whether they are for or against abortion, of a decision that is well written and well reasoned. It is not the conclusion, but the opinion is not offered as the way to write a decision.

And so with that understanding. I searched long and hard. And I asked my staff—excuse me—and we could not find anything that I would be able to say that Judge Scalia indicated that *Roe* v. *Wade* was wrongly decided.

Ms. **Smeal**. Senator, it was my understanding—and I will show you our quotes or our cites—is, that he uses it as an illustration of when the Court invents a right that is not specified anywhere else and is not a consensus in the public and not a consensus in the past, and therefore, was erroneous.

I mean, that is the only inference that you can draw from his illustrations, that it was the invention of a right.

Senator **Biden**. I apologize for not being here for your testimony As you know we had a little tempest in a teapot here a moment ago that I have been spending more of my time during the Scalia hearings being a traffic cop than I have been being able to thoroughly and consistently interrogate Judge Scalia.

But I will read your statement. And I apologize, because I take your criticisms and your position very seriously. And I will go back and read the statement.

But if it is not in the statement with any specificity, to the extent that you can augment the statement, I would find it very helpful.

Ms. **Smeal**. It is in the statement briefly. But we will augment it. We feel strongly that this is—he illustrates it, he uses this as an example. But also, frankly, it troubles me when he says that rights must be based on a consensus. The word consensus even worries me, because if you look it up in a dictionary, that means almost everyone must agree. And if women are going to wait that long, my children, grandchildren and their children's children will not be seeing equality for American women.

Senator **Biden**. Well, let me point out one other thing. And I would like to let Mr. Rauh comment on this, because it is a good place to, if you will, to jump off to the next point and ask Mr. Rauh to comment.

When I pressed him yesterday, before I was humorously and somewhat summarily cut off by the distinguished Senator from Maryland, I understood that he was making a real distinction based on his use of the phrase consensus, the word consensus.

My understanding of his response to my question along the lines of whether or not you require a societal consensus to confirm a right that was not explicitly granted under the Constitution, under his doctrine of original meaning, which he distanced himself from with some rapidity, that he said that no Senator—I am paraphrasing—no Senator, you do not require a consensus to acknowledge a right existing where in fact it is clear that there was the intent that a right was to exist. And he made a distinction between race discrimination and the 14th amendment, which did not require a consensus even though it did not specifically mention race, and other rights that might or might not be viewed in the context of the ninth amendment or any other amendment.

And the second thing—and this is more a recitation, Mr. Rauh, than a question, but I would like you to respond to these three, because I think all three fit—the third piece was that, as I saw it, he was making the case that he acknowledged the existence of certain rights within the Constitution that were not specifically enumerated within the Constitution. And I quite frankly found that if you took only his answer, his answer was a fairly reasoned, rational answer. Because as he points out, the Court, all members of the Court, all sitting members of the Court—I will put it another way, none of the sitting members of the Court have used the same standard for determining whether or not discrimination existed as a consequence of the violation of the due process clause or equal protection clause of the 14th amendment.

None of them used the same standard under the 14th amendment judging discrimination against women as against blacks. They all make gradations.

Now, how does it paint him outside the mainstream, if that is necessary, and you may conclude it is not? How is he markedly different than any other judge?

Because Ms. Smeal makes a compelling case that women should be treated precisely like blacks for the purposes of the 14th amendment. Yet not a single Justice, to the best of my knowledge, has so treated them.

How do you respond to those three areas?

Mr. **Rauh**. It is very hard to even remember the three areas, but I will do the best I can, Senator.

First, on the question of whether he has an agenda. Judge Scalia is fooling somebody. He is either fooling the President of the United States or he is trying to fool this committee.

The President of the United States, in a speech yesterday, said that through the appointment of over 40 percent of the courts, meaning lower Federal lower courts, and the Supreme Court, he, the President, had an agenda on abortion, prayer, and other matters.

The President had a talk with Judge Scalia before he appointed him, and either Judge Scalia fooled the President that he had an agenda or he is fooling you when he says he does not. I do not know which way it goes, but I do know that he cannot have it both ways.

Second, on the question of consensus, I would like to say that is not what Judge Scalia wrote, Senator Biden. He wrote that if there is something in our society where rights are fixed for a long time, you cannot change that until you get a consensus. He says that, for example, you would still have *Plessy* and *Ferguson.* My God, we had it for almost 60 years.

Senator **Biden**. But his response to that was that was clearly not what he meant.

Mr. **Rauh**. All I can say is that is nonsense. All I listen to are these people saying he is probably the most articulate writer in America, and now he is telling you he did not mean exactly what he said.

Again he is trying to have it both ways. He is a great writer, he gets everything exactly right, he is the most articulate man in America. But now on a most important subject like this, he says he did not mean what he said.

Third, I am not enough of a scholar on sex discrimination to say that every Supreme Court Judge has accepted a differentiation between race and sex. They may have; I am not sure, but at least Judge Scalia has always gone for the lowest standard, the one that will make it the hardest to prove discrimination against women.

Senator **Biden**. Well, let me ask you again before the record closes out, because it is a very important point to make, and I want to be fair to him, and I must acknowledge I am inclined to the view that you hold.

But if I look at his writing, he did not say what we are saying. He said, and I ask you to read, not at this moment, but if you read the so-called Panhandle speech where he in fact makes the assertions that we are speaking to here. He says, and I quote,

> I do not care how analytically consistent with analogous precedence such a holding might be nor how socially desirable in the judge's view. If it contradicts a long and continuing understanding of our society, as many of the Supreme Court's recent constitutional decisions referred to earlier do in fact, it's quite simply wrong. There will be no relief from the most far-reaching intrusion in the modern society until the Supreme Court returns to essentially common law view of approach to constitutional interpretation.

Then you go back and look at what he has referred to. He has not referred to any race matters; he has not referred to any matters. He has referred to the question of obscenity, discipline for high school students, prayer in school, and I do not know what else. I will have to go back and read it. But he does not refer, he does not refer to abortion, women, race, or the things that concern me the most.

In fact, if he is as skillful a writer as we say, he is just that. He says, referring back to what he spoke to earlier. In the above paragraph, he talks about certain things that are established, and he makes reference that race and other things are established.

The reason why I asked him the question I did yesterday, Mr. Rauh, is that if he subscribed to that position, then it seems to me, ironic as it may seem, he is going to be hard pressed to overrule *Roe* v. *Wade*. Because if, in fact, he argues that there is in fact precedent, unless there is a clear consensus to change it, *Roe* v. *Wade* occurred 18—How many years ago now?

Ms. **Smeal**. 1972.

Senator **Biden**. 1972. So, what is that, 16 years ago or 14 years ago.

Ms. **Smeal**. 1973.

Senator **Biden**. 1973; 13 years ago.

I became a Senator because I could not add. But, all kidding aside, you know, it seems to me that you could easily make the argument that in fact he would be bound by that statement to in fact uphold *Roe* v. *Wade*.

Ms. **Smeal**. Do you not read other statements?

Senator **Biden**. Sure, yes. No, I do. I truly want to know this. I am not playing a game.

Ms. **Smeal**. Well, here is a statement on the abortion situation, for example, what right exists? The right of a woman who wants an abortion to have one, or the right of the unborn child not to be aborted? He goes on for some things, and then says:

> The Court has enforced other rights so-called on which there is no societal agreement from the abortion cases at one extreme to school dress codes and things of that sort. There is no national consensus about those things and never has been. The Court has no business being there. That is one of the problems. They are calling rights things which we do not all agree on.

And there is stuff in the middle, you know, to the bottom line——

Senator **Biden**. What are you reading from? Can you tell me that? My time is up. I am sorry. But tell me what are you reading from if you could, is it on a statement?

Ms. **Smeal**. I am reading from an article, but I will give you the exact cite on it.

Senator **Biden**. OK. You do not have to do it now. And I will come back because I did not realize my colleague was waiting. I apologize.

Senator **Heflin**. It is all right. Go ahead.

Mr. **Rauh**. May I finish my answer?

Senator **Biden**. Sure.

Mr. **Rauh**. I am very glad that Ms. Smeal gave you that quote because I think it was a very good one.

I was going to read you the same thing you read me. It is the same quote from Judge Scalia.

The fact that he refers to a part of the constitutional problems and uses those as an example certainly means that he does not say the same thing with regard to race and sex. Indeed, since race and sex are really more important than these kinds of problems, and discrimination, it seems to me, much more important, say, than pornography, discrimination is the heart of our problem in America today.

I would say a fortiori what he is saying about those examples he is saying about race, and he intended it to be interpreted that way.

Senator **Biden**. But he specifically said yesterday he did not intend it to be read.

Mr. **Rauh**. There is no logic in saying that this applies to the less important things—that his views apply to the less important issues and not the more important issues.

Senator **Biden**. Well, I have no argument with you on philosophy. I do have an argument with you on interpretation of what he is saying. I mean because in fact if anyway you wanted to say something?

Mr. **Gold**. I find it difficult to determine whether Judge Scalia has an agenda or not, and that is one of the reasons we submitted the kind of testimony we submitted. I am very interested in what you told us about his responses yesterday. He has written relatively few judicial opinions on matters of great substance. Much of what we brought to your attention is in these occasional academic pieces, most of which are not extraordinarily profound at least as we read them.

It seems to us to go back to what I have said several times, that what Judge Scalia has chosen to say—and one of the panelists who preceded us said there is a great advantage in having an academic nominated for the Court because he leaves a record in his writings of the kind that a practicing lawyer does not—does seem to be an agenda. And it is an agenda primarily designed to hobble the affirmative use of Federal Legislative power and to transfer, as we said, to the extent that the Legislature chooses to act, the final trump card from the legislature to the Executive.

Senator **Biden**. Assume that to be the case, is that a radical view or is that just a difference in philosophy?

Mr. **Gold**. To me it does not matter whether it is a radical view——

Senator **Biden**. Well, it does to me. I am asking you whether you think it is.

Mr. **Gold**. I think that it is one which profoundly changes the balance of power that the Constitution envisages. To say that it is radical; to say whether it is shared by others, to me, that is not the question. I would hope that the question for Members of the Senate is whether the view is deeply held and sufficiently wrong; the President should not be able to steal a march in that particular way.

Senator **Biden**. Well, do you philosophically agree or disagree with him? What you think is wrong and what I think is wrong is not what a majority of this committee thinks is wrong probably.

Mr. **Gold**. It may be or it may not. To us the test is whether the nominee's view of the Constitution is sufficiently wrong that he is not worthy of confirmation in the considered judgment of 50 Senators plus 1.

Senator **Biden**. That is what is right and wrong, right, 50 plus 1?

Mr. **Gold**. It is 50 plus 1 people making up their minds about what is right or wrong.

Senator **Biden**. Yes.

I do not have any further questions; back to you.

Senator **Heflin**. Let me make one comment which is, speaking about well-reasoned opinions and consensus building. Sometimes well-reasoned opinions are sacrificed in order to build a consensus of a majority.

Let me ask you basically the same question that I asked the other panel, and which they established, I think fairly well, two assumptions that would be involved in this question.

One, Judge Scalia is an excellent consensus builder, and second, he and Justice Rehnquist are closely aligned with some distinctions, as they pointed out, in ideology.

Basing those assumptions that they are closely aligned, and that he is an excellent consensus builder, and make the further assumption that President Reagan appoints two other members of the Court during his term of office. Then the question is: What would be the trend of such Court is the first question; the second is whether you would expect any wholesale reversal of present holdings in areas that you might want to identify; and, third, what position do you predict that history would give Judge Scalia if such a reversal movement occurred?

Each of you can answer.

Ms. **Smeal**. Well, on the first part, building a consensus, you know, it is very hard to tell that except that if he builds a consensus against what he has written on the subjects of minority rights and women's rights, and all I can deal with is what he has either publicly stated or written, and his cases, it will be one that will pretty much gut affirmative action as we know it.

It will be, for sex discrimination, even more disastrous because there are—to give you, just in quoting it under title IX, he writes an article in which he questions what sex discrimination and the federally assisted educational programs means, finds these too vague, even though they are Federal regulations that have been in force since 1974 saying what they mean.

He says sexual harassment is individual and it is not discrimination in conditions of employment because of gender, and should not be viewed as a violation of title VII.

Right now that is the most extreme position. That is even to the right of Mr. Rehnquist. So if he and Rehnquist build a consensus into that viewpoint, we are undoing literally the gains of the last 25 years for women's rights under the law. And, of course, on race, it would be narrowing the remedial corrections of the past because he questions whether the Court should enforce the measures to correct past discrimination. And without enforcement, I just do not think you can wait around for magic consensus.

So, I think that it would be a disaster, and that is why I think it is important enough for me and for all organizations to be up here testifying. I think that more people should think that the philosophical viewpoint of these judges are important enough to disjudge on them themselves. I mean these are hard—everybody has to go with what they have before them. But to me it indicates a direction away from the dream of equality for all.

I do not think we have in 1986 going into the 21st century, I do not think we should be rehashing and rehashing these 19th century problems under all kinds of rubrics the role of the Court, the role this. But every time he discussed the role of the Court—and, by the way, Senator Biden, that article that I had, that other quote on abortion was an imperial judiciary, in fact it was a public discussion in the American Enterprise Institute of 1978.

But every time he discussed does the role of the Court go too far, his examples on moral social discrimination type questions. That is why we are up here. The examples given on the area of sex discrimination, or the area of racial discrimination, and they are the ones that I think need the most protection of a Constitution that is not viewed as one of just getting consensus of the day or the past, for heaven sakes, where indeed we had a deplorable history of discrimination on the basis of race, ethnicity, and of sex.

So I feel it is enough for us to be concerned about, but I think that we put too much on people's affability, too much on people's ability to write, and we should take those as given, that people are good-natured, and that they can write well. I think that what they write about should be what the issue is.

Mr. RAUH. Senator Heflin, my answer to your question on consensus building is that you do not build a consensus from an extreme. I do not care how much affability you have, how much charm—and there was testimony about this great affability and great charm. You do not build a consensus from one end; you build it from some more moderate position.

Second, I think he and Chief Justice Rehnquist are very closely aligned. I agree with the three lawyer panel, this morning that their views are very close.

Finally, with the idea of two more Rehnquist/Scalia type appointments, which I take it is the presumption of your question, God help us is just one of the things I would answer. In addition to that I would say the favorable affirmative action cases will be overruled; school prayer cases will be overruled; abortion cases will be overruled. And that is not the worst of it.

Rehnquist has been trying to get certiorari almost every time we win a big civil rights case in a court of appeals. These four would have all the votes they need for certiorari. They could make the good courts of appeal say uncle on their support of civil rights. Your very fine fourth and fifth circuits are going to go by the boards. They are going to have to follow Rehnquist and Scalia, even on factual things, because Rehnquist can get certiorari. You get four judges on that Court like Rehnquist and Scalia, and it will be disaster not only with the cases they are going to reverse, but with the reversal of the decisions enforcing the things that are the law now.

And I say that would be a tragedy for our country.

Mr. GOLD. I have never met Judge Scalia and I cannot comment on his affability or his consensus-making powers. In terms of our best judgment from his writings, and as the panel members this morning said, his votes are very likely to be similar to Justice Rehnquist's. We have different degrees of certainty about what we know, but that would seem to be the probabilities, aside from what yesterday's discussion may have revealed. Most to the point, though, is that the questions you raise get us back to the discussion I was having with Senator Biden.

There is no doubt, from what we know about the appointing process as it is being practiced, that the President and his advisors have certain tests that they are applying to nominees.

These are not individuals who have made their reputation through broad acceptance——

Senator **Biden**. A priori, that would mean anyone that this administration sent up would be bad, right? Any person at all?

Mr. **Gold**. I would begin with a healthy skepticism, and Senator Heflin's question is if the views of those who know him far better than I do that Judge Scalia lines up with Justice Rehnquist are taken as correct, and if two more people who share those views are appointed, what kind of a Court would you have?

I am trying to answer that question, and I am saying that the kind of Court you would have would be a Court which would rarely, if ever, uphold claims of individual right, and it would be a Court structured on my hypothesis, to perform in precisely that way. And that brings us to the question of the role of the Senate. It seems to us the role of the Senate is in the system of checks and balances, to determine whether or not the President's tendency has to be checked and balanced; I see no escape from that, and it seems to me, as we argue in our testimony, it is inherent in the constitutional plan. The President does not have the right to shape the judiciary. He has the power of the initiative. And then there are 100 people with very difficult decisions to make about what the Constitution means, when enough is enough, and what the role of the Court is, both with regard to the legislative power, and with regard to the guarantees of individual rights.

Senator **Biden**. I understand the point. If the Senator would yield for a question.

Senator **Heflin**. Yes.

Senator **Biden**. I just remind my friend, that in 1988, we will have a different President, and it may be a President who shares the point of view that I have, which is generally consistent with the point of view represented by the panel. And we may not have the Senate, and I hope we do not get read back all the remarks that were made here today, about who has what choices and under what circumstances.

I am not at all certain, by the standard that you are outlining for me, which is technically correct, in my view, from a reading of the intentions of the Founding Fathers, that if in fact, were I advising the next President of the United States, and I found myself three Thurgood Marshall's, and sent them up here, that in fact there would be no prospect of those three Thurgood Marshall's being put on the Court, applying the reasoning that you are applying here, if in fact the Senate were controlled by the Republican Party still.

Mr. **Rauh**. May I remind the Senator from Delaware, that you have a good case for reading things back to the other side. When Abe Fortas was nominated for Chief Justice, the chairman of this committee—and there are undoubtedly others in that category in the Senate today—opposed Fortas on philosophical grounds, would not permit a hurry up, filibustered it and beat it. And they beat it through having a third, plus one, who said, "Well, all we're interested in is Fortas's philosophy." The issue of Wolfson and greed had not come up at that time, and what they did was to beat him on philosophy.

I hope that you will read some of that record back to them. You have got a chance now. It is up to——

Senator BIDEN. I will read the record back to them but I hope I act more responsibly than they did.

Mr. RAUH. I hope so, too, sir.

Ms. SMEAL. Well, Senator——

Mr. GOLD. I am sorry. If I could finish with one point in light of what——

Senator BIDEN. It is up to the Senator from Alabama.

Senator HEFLIN. Well, since they are answering your questions and since they are attacking you on this position, I think it is proper for you to go ahead.

Mr. GOLD. I hope we are not attacking Senator Biden. It would be both foolish and unworthy. He is raising serious issues.

We did not choose to testify against Justice Stevens. We did not oppose Justice Harlan. There are different types of nominations. There are nominations of people who promise to bring a wide disinterestedness to their task. We have the capacity—I know you have the capacity—and I believe there are, many Republicans who have the capacity to judge nominations of that kind on their merits.

Senator BIDEN. I am about where you are; great doubt but no decision. When you make a decision, then you can lecture me on my making a decision, and before my friend from Maryland who takes great pride in making comments about when I am speaking, I will yield before he has a chance to say anything more.

Senator MATHIAS. No, I am just the servant.

Senator BIDEN. Of the people.

Senator MATHIAS. Of the committee.

Ms. SMEAL. I am dying over here because this thing on philosophy——

Senator BIDEN. I yield. I yield to him.

Ms. SMEAL. Can I answer that?

Senator BIDEN. It is up to the chairman.

Ms. SMEAL. I just want—it is just a comment on his question about if anybody coming up here would be opposed, and that this is a philosophical, bad precedent.

Senator MATHIAS. Did you want to respond?

Senator BIDEN. I have no statement. I would like to hear her answer but I do not want to run the risk of your wrath. I would rather them have it.

Senator MATHIAS. I am never wrathful.

Senator BIDEN. Well, why don't you let her answer the question, then.

Ms. SMEAL. All I wanted to say, real quickly, is, that I think that you would not have to worry if in 1988 it changed, and anything like this was quoted back, because I think we should come to a point in the United States of America, that we are not rediscussing race discrimination and sex discrimination every 4 years.

I think we have been very careful. We are not giving partisan Republican or Democratic philosophical, broad sweep testimony here.

We are saying that there are certain things that should be sacrosanct. That the principal of equality of justice for all has to have meaning, and that indeed, people who have views on individual rights and on sex discrimination, that put in question our whole records on how to end discrimination in affirmative action, should not be confirmed, because all we will be doing is reliving the battles of the 1950's and the 1960's again and again, and it is enough.

Senator **Biden**. Thank you.

Senator **Mathias**. Once again, I think, for the second time, I thank you for your attendance at this hearing——

Mr. **Gold**. And thank you for your patience, Senator.

Senator **Mathias** [continuing]. And your very helpful comments. We appreciate it.

Mr. **Rauh**. Thank you, sir.

Senator **Biden**. Thank you all.

Senator **Mathias**. May I inquire if Mr. Roy C. Jones of the Liberty Federation is in the room? Is Mr. Jones in the room?

[No response.]

Senator **Mathias**. Then our third panel will be composed of Mrs. LaHaye, the president of Concerned Women for America; Mr. Bruce Fein of United Families Foundation; Miss Sally Katzen, a lawyer with Wilmer, Cutler & Pickering; and Mr. Jack Fuller, the editorial editor of the Chicago Tribune.

If you will all raise your right hands. Do you swear that the testimony you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

Mrs. **LaHaye**. I do.

Mr. **Fein**. I do.

Ms. **Katzen**. I do.

Mr. **Fuller**. I do.

TESTIMONY OF A PANEL CONSISTING OF BEVERLY LAHAYE, PRESIDENT, CONCERNED WOMEN FOR AMERICA, WASHINGTON, DC; BRUCE FEIN, UNITED FAMILIES FOUNDATION, WASHINGTON, DC; SALLY KATZEN, WILMER, CUTLER & PICKERING, WASHINGTON, DC; JACK FULLER, EDITORIAL EDITOR, CHICAGO TRIBUNE, CHICAGO, IL

Senator **Mathias**. Mrs. LaHaye, do you want to start? I would remind you of our 3 minute rule. The red light will indicate that 3 minutes have expired.

Without objection, all statements will be included in full in the record, as if read.

Mrs. **LaHaye**. I am Beverly LaHaye, president of Concerned Women for America, which is the Nation's largest nonpartisan activist women's group.

We have 565,275 members as of this morning, and we are growing. We are in all 50 States, representing women from many professions, many different races, and many religious backgrounds.

Concerned Women for America was formed to help protect the family, to promote constitutional freedoms and traditional values. CWA lobbies on various issues and has a legal department that recently won a case before the U.S. Supreme Court.

The members of Concerned Women for America support the nomination of Antonin Scalia to the U.S. Supreme Court, and we urge quick Senate approval of his nomination. On credentials alone, Judge Scalia shows sterling qualifications for the Supreme Court.

His scholarly works influence the legal community with their well-reasoned arguments. CWA supports Judge Scalia's nomination largely due to his strong commitment to judicial restraint.

He is a judge that interprets the Constitution in light of the intent of the Framers. He resists the temptation that many judges have fallen into, of creating new constitutional or legal rights out of thin air, when they have no textual or historical justification.

His vigilent philosophy of judicial restraint will help protect the Constitution from judge-made erosion. In these changing times, with many voices espousing their positions, all Americans, men and women, need a written Constitution that stands firm, changed only by the will of the people expressed through the amendment process.

Judges and courts must not sit as unelected perpetual constitutional conventions, and impose their moral values on the majority.

We need judges who live by an active commitment to judicial restraint and respect for the principles placed in the Constitution by the Founding Fathers. Antonin Scalia fills that need. It has been said, and reported, that women's groups all oppose the nominations of Justice Rehnquist and Judge Scalia. As the president of the largest women's organization in the United States, with over half a million members, I am here to inform you that that statement is wrong.

Concerned Women for America has over double the membership of the next largest women's organization, and CWA supports the nomination of Judge Antonin Scalia to the Supreme Court, and William Rehnquist as Chief Justice.

Judge Scalia's intellectual abilities, experience, and deep understanding of the Constitution are plain to all.

Concerned Women For America urges the Senate to confirm Antonin Scalia to the U.S. Supreme Court. Thank you.

[The statement follows:]

Testimony of Beverly LaHaye

President, Concerned Women for America

Concerned Women for America is the nation's largest nonpartisan womens' group with over 560,000 members in all fifty states representing women from all professions, all races and all religious backgrounds. Concerned Women for America was formed to help protect the family, promote constitutional freedoms and traditional values. CWA lobbies on various issues, and has a legal department that recently won a case before the U.S. Supreme Court.[1]

The members of Concerned Women for America support the nomination of Antonin Scalia to the U.S. Supreme Court, and urge quick Senate approval of his nomination.

On credentials alone, Judge Scalia shows sterling qualifications for the Supreme Court. He is a judge on the D.C. Circuit Court of Appeals, served as Assistant Attorney General for the Office of Legal Policy in the Ford Administration, taught at the law school at the University of Chicago and the University of Virginia. His scholarly works influence the legal community with their well-reasoned arguments.

Concerned Women for America supports Judge Scalia's nomination largely due to his strong committment to judicial restraint. He is a judge that interprets the Constitution in light of the intent of the Framers. He resists the temptation that many judges have fallen into of creating new constitutional or legal rights out of thin air, when they have no textual or historical justification.

For example, Judge Scalia refused to rule that the Constitution contains a "right to sodomy." The Supreme Court agreed with that view in a different case presenting the same constitutional issue just this June.

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[1] See Larry Witters v. State of Washington Dept. of Services for the Blind, 474 U.S. ___, 88 L.Ed.2d 846 (1986).

Judge Scalia has also supported the state's constitutional power to impose capital punishment, because the Framers intended states to exercise that power. His vigilant philosophy of judicial restraint will help protect the Constitution from judge-made erosion.

In these changing times with many voices espousing their positions, all Americans, men and women, need a written Constitution that stands firm, changed only by the will of the people expressed through the amendment process. Judges and courts must not sit as unelected, perpetual Constitutional Conventions, and impose their moral values on the majority. We need judges who live by an active committment to judicial restraint, and respect for the principles placed in the Constitution by the Founding Fathers. Antonin Scalia fills that need, as does Chief Justice nominee William Rehnquist.

It has been said that womens' groups all oppose the nominations of Justice Rehnquist and Judge Scalia. As the president of the largest women's organization in the United States, with over half a million members, I am here to inform you that that statement is wrong. Concerned Women for America has over double the membership of the National Organization for Women. CWA supports the nomination of Judge Antonin Scalia to the Supreme Court, and William Rehnquist as Chief Justice.

Judge Scalia's intellectual abilities, experience, and deep understanding of the Constitution, are plain to all. Concerned Women for America urges the Senate to confirm Antonin Scalia to the United States Supreme Court.

Senator **Mathias**. Thank you very much. Mr. Fein.

STATEMENT OF BRUCE FEIN

Mr. **Fein**. My name is Bruce Fein and I represent United Families of America. United Families enthusiastically urges the Senate to confirm Judge Antonin Scalia as Associate Justice of the United States.

Judge Scalia is more richly endowed with the experience and attributes necessary for outstanding performance on the Supreme Court than any nominee since Charles Evans Hughes over 50 years ago.

Judge Scalia has taught law, and taught law is intellectually tough law. Judge Scalia has occupied high-level positions within the executive branch. The experience has honed Scalia's mind to a deep appreciation of the Constitution's separation of powers, its subtleties, and its indispensability to energetic, accountable, and unoppressive government.

Finally, Judge Scalia has served several years on the U.S. Court of Appeals for the District of Columbia Circuit. His judicial performance has been exemplary. Always well prepared for oral argument, incisive in opinion writing, and a close intellectual companion of any judge searching for a constitutional or statutory principle in expounding the law.

Judge Scalia will bring to the Supreme Court desperately needed mental rigor and analytical power. Three areas of constitutional law illustrate the Court's recent departures from constitutional intent, and substitution of social policy concerns as a basis for decisionmaking. Abortion, obscenity, and church/state issues. Now the *Roe* v. *Wade* case has already been referred to today, and I could perhaps even rely on Senator Biden for suggesting that it was ill-reasoned and not a vindication of the intent of the 14th amendment architects.

Senator **Biden**. That is going a little far. I did not say that.

Mr. **Fein**. We can come back to that. But as Senator Biden at least tactitly acknowledged, the Court's opinion consulted ancient attitudes, the Hippocratic oath, the common law, the English statutory law, the American law, the views of the American Medical Association, the views of the American Bar Association, the views of the American Public Health Association, but where were the views of the constitutional architects?

Senator **Biden**. I was not going to fight with you today until this. [Laughter.]

Mr. **Fein**. A right of privacy found nowhere in the constitutional text or constitutional history was invoked to justify the Court's general denunciation of laws that regulated abortion in order to safeguard potential life.

And even last month, the Supreme Court extended its right of privacy concept to invalidate a State law that simply required the truthful provision of information relating to the abortion decision, because the Court thought that truthful information might convince the mother to choose childbirth over abortion.

Judge Scalia, we believe, will employ constitutionally pertinent criteria in examining abortion issues, and lead the Court out of its current confusion and constitutional lawlessness.

As Associate Justice White recently warned, the Court is most vulnerable, and comes nearest to illegitimacy, when it deals with judge-made law having little or no cognizable roots in the language or design of the Constitution, and Justice White was speaking for a majority of the Court.

Now as in the case of abortion and in other areas, rectifying the Supreme Court's decision will not require that abortions be restricted.

The rectification will simply return the question to State and local officials to struggle with the anguishing issues involving the fetus, the mother, the father, children, and social ethics.

It would be slanderous to the good name of the American people, and contrary to experience, to suggest that questions of abortion will not be responsibly handled by elected representatives of the people.

I have amplified on similar sentiments regarding abortion and church/state issues. I simply would close with these observations. Responsibility is the mother of courage and individual growth. If in contravention of constitutional intent, the people are denied responsibility over most questions of abortion, obscenity, or church/state relations, then nothing prevents the courts from arrogating responsibility for virtually any contentious public policy issue.

The consequence would be a demoralized citizenry, unconcerned, and untutored in the arts of self-government.

In conclusion, we strongly support Judge Scalia for confirmation as Associate Justice of the Supreme Court.

[Prepared statement follows:]

TESTIMONY OF BRUCE FEIN
ON BEHALF OF UNITED FAMILIES OF AMERICA

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN SUPPORT OF JUDGE ANTONIN SCALIA
NOMINATED AS ASSOCIATE JUSTICE OF THE UNITED STATES

Mr. Chairman and members of the committee,

My name is Bruce Fein and I represent United Families of America. United Families of America enthusiastically urges the Senate to confirm Judge Antonin Scalia as Associate Justice of the United States.

Judge Scalia is more richly endowed with the experience and attributes necessary for outstanding performance on the Supreme Court than any nominee since Charles Evans Hughes over 50 years ago. Judge Scalia has taught law; and "taught" law is intellectually tough law. Judge Scalia has occupied high level positions within the Executive Branch. The experience has honed Scalia's mind to a deep appreciation of the Constitution's separation of powers, its subtleties, and its indispensability to energetic, accountable, and unoppressive government. Finally, Judge Scalia has served several years on the United States Court of Appeals for the District of Columbia Circuit. His judicial performance has been exemplary: always well-prepared for oral argument; incisive in opinion writing; and a close intellectual companion of any judge searching for constitutional or statutory principle in expounding the law.

Judge Scalia will bring to the Supreme Court desperately needed mental rigor and analytical power. Three areas of constitutional law illustrate the Court's recent departures from constitutional intent and substitution of social policy concerns as a basis for decision-making: abortion, obscenity, and Church-State issues.

In the landmark 1973 decision of Roe v. Wade, the Supreme Court discovered a broad constitutional right to an abortion in the due process clause of the Fourteenth Amendment, over a century after the Amendment was ratified. The Court held that during the first trimester of pregnancy, abortions must be virtually unregulated; that during the second trimester of pregnancy, regulation of abortions was permissible, but only to further maternal health; and, that during the third trimester of pregnancy, abortions might be prohibited, unless necessary to safeguard the mental or physical health of the mother. The Court added that its announced constitutional code of abortion would change with progress in medical technology that shortened the gestational period when the fetus would be viable outside the womb.

The Roe v. Wade ruling was not a vindication of the intent of the Fourteenth Amendment architects. Rather, the decree vindicated the public policy preferences of a majority on the Supreme Court. That conclusion is reinforced by the fact that the Court's opinion consulted ancient attitudes, the Hippocratic Oath, the common law, the English statutory law, the American law, the views of the American Medical Association, the views of the American Public Health Association, and the views of the American Bar Association, while generally ignoring the intent of the Fourteenth Amendment authors. A right of privacy, found nowhere in the constitutional text or constitutional history, was invoked to justify the Court's general denunciation of laws that regulated abortion in order to safeguard potential life.

Unchained from the Constitution, the Court's right of privacy concept became a juggernaut to invalidate involvement of concerned fathers or parents in the abortion decision. On the other hand, the Court upheld restrictions on government funding of abortions, and acknowledged a valid state interest in encouraging childbirth over abortion. But then last month, the Court held in Thornburgh v. College of Obstetricians that a state invaded the right to privacy by requiring truthful information relating to the abortion decision that might convince the mother to choose childbirth.

The Supreme Court's creation of a constitutional right to an abortion represents social policy, not legal judgment. That explains why the Court's cluster of abortion rulings are in legal principle irreconcilable; social policy judgments differ from Justice to Justice.

Judge Scalia, we believe, will employ constitutionally pertinent criteria in examining abortion issues, and lead the Court out of its current confusion and constitutional lawlessness. As Associate Justice White recently warned, "the court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made law having little or no cognizable roots in the language or design of the Constitution."

Rectifying the Supreme Court's abortion cases will not require that abortions be restricted. The rectification will simply return the question to State and local officials to struggle with the anguishing issues involving the fetus, the mother, the father, and social ethics. It would be slanderous to the good name of the American people and contrary to experience to suggest that questions of abortion will not be responsibly handled by elected representatives of the people.

The High Court's pronouncements addressing the discretion of elected officials to proscribe or regulate indecent or lewd speech under the banner of the First Amendment are also unsound. The purpose of the free speech clause was to safeguard political and cognate discussion or expression from government abridgment. As Chief Justice Charles Evans Hughes explained in DeJonge v. Oregon, it is imperative "to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." In addition, Justice Brandeis noted in Whitney v. California that rights of free speech were intended to insure that the deliberative forces in society prevail over the arbitrary on matters of public policy, and to foster the discovery and spread of political truth.

The Supreme Court, however, has nullified government efforts to regulate or prohibit indecent or lewd speech or activity inconsequential to vigorous political debate. In Cohen v. California, for instance, the Court held unconstitutional an effort to punish the public display of the words "F___ the Draft" on the back of a jacket. And in Miller v. California, the Court defined constitutionally unprotected obscenity to include only a very small category of pornography. These rulings may represent wise social policy. But social policy decisions have been assigned to elected branches of government under the Constitution. The Supreme Court's duty is to expound the Constitution in accord with original intent.

Speech or behavior that is designed to arouse sexual desire as opposed to triggering cerebral reflections should be governed by laws enacted by elected representatives. That conclusion is both consistent with the purpose of free speech in our democracy, and respectful of the rights of communities to establish rules of social discourse that fit a local ethos.

The Supreme Court's Church-State rulings are a collection of ad hoc social policy judgments generally heedless of the intent of both the First and Fourteenth Amendments. Organized but voluntary public school prayer, the public posting of the Ten Commandments, or moment-of-silence statutes are unconstitutional, according to the Court, if intended as an endorsement of religion. A State may loan parochial school children textbooks, but it may not loan a film on George Washington, or a film projector to exhibit the film in history class. A State may pay for bus transportation to religious schools, but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school, but therapeutic services must be provided in a different building.

The incoherence of the Court's freedom of religion cases necessarily results from its use of social policy preferences rather than constitutional intent to control its deliberations. Thomas Jefferson's so-called wall of separation metaphor, expressed in a short note to the Danbury Baptist Association, has been invoked by the Court to fasten on States strict limits on aid to nonpublic schools under the aegis of the Fourteenth Amendment. Jefferson, however, was in France when the Bill of Rights was adopted by Congress and ratified by the States. Moreover, the First Amendment was explicitly drafted to exclude any application to the States. Finally, Jefferson was dead when the Fourteenth Amendment was ratified, and there is no cogent evidence that the authors of that 1868 Amendment intended to incorporate Jefferson's wall of separation theory to prohibit State assistance to religious endeavors. In sum, with a few exceptions, the Supreme Court is insincere about elaborating Church-State doctrine consistent with constitutional intent.

The decisions of the Supreme Court that affront constitutional intent may reflect enlightened social policy. If so, then there is good reason to believe many States or localities would embrace such policies voluntarily. But the tired refrain that the people of the United States would repeatedly act oppressively unless prevented by Supreme Court decrees is discredited by experience and common notions of fair play and equity. To be sure, legislatures often act unwisely, and occasionally callously. But the favored constitutional remedy is in the court of public opinion where legislative error may be corrected through the ballot box or otherwise. As Justice Cardozo taught, judges are not justified in overturning laws simply because they offend their sense of morality.

Moreover, the Supreme Court itself frequently errs and expounds harsh or unsentimental constitutional doctrine. High Court decisions holding unconstitutional the 1875 Civil Rights Act, the income tax, child labor laws, minimum wage laws, and laws protective of union activity all testify to Justice Jackson's epigram: the Supreme Court is not final because it is infallible; it is deemed infallible because it is final.

Responsibility is the mother of courage and individual growth. If, in contravention of constitutional intent, the people are denied responsibility over most questions of abortion, obscenity, or Church-State relations, then nothing prevents the courts from arrogating responsibility for virtually any contentious public policy issue. The consequence would be a demoralized citizenry unconcerned and untutored in the arts of self-government.

Judge Scalia, we believe, recognizes the significance of constitutional intent, doctrinal coherence, and predictability in the evolution of constitutional jurisprudence in a Nation founded on the creed of government by the consent of the governed. We believe Judge Scalia would help to extricate the Court from its uninspiring meanderings into the political and social policy thickets. We thus recommend his confirmation as Associate Justice of the Supreme Court.

Senator MATHIAS. Thank you very much. Miss Katzen.

Ms. KATZEN. Thank you.

STATEMENT OF SALLY KATZEN

My name is Sally Katzen. I am a lawyer in private practice—a partner at Wilmer, Cutler & Pickering here in Washington.

I am speaking today on behalf of myself alone in support of the nomination of Judge Scalia.

As you know, several women's groups have voiced concern about Judge Scalia. I understand that they are concerned because, based on his opinions and other statements, they believe that if he were confirmed he would undo much of what the women's movement has accomplished in the courts in the last decade.

In essence they disagree with Judge Scalia's position on a number of issues of importance to women.

I, too, disagree with Judge Scalia on many of these issues. But whereas they believe him to be closeminded, or perhaps affected by a personal bias against or insensitivity to women, my experience is very much to the contrary.

As Dean Verkuil noted this morning, Judge Scalia, who was then Professor Scalia, served as the chairman of the administrative law section of the American Bar Association in 1980-81. I had been elected to the council of the section, which is the decisionmaking body, in August 1980, when I was serving as the general counsel of the Council on Wage and Price Stability in the Carter administration.

My 3-year term on the council of the administrative law section coincided with Judge Scalia's tenure as chairman-elect, chairman, and past immediate chairman. As a result I had an opportunity to see firsthand Judge Scalia's stewardship of the administrative law section, and how he chose to exercise the leadership role that he had.

During those years I found Judge Scalia to be very bright; with strong analytical skills, well versed on administrative law issues, and intellectually curious.

He rarely, if ever, accepted arguments or contentions just because they were forcefully presented. He frequently challenged positions, including his own, in a spirit of collegial decisionmaking and debate. He attempted to bring his colleagues around to his point of view, but he was equally willing to be persuaded by well-reasoned, well-documented arguments. And I wish to stress that he never demonstrated any bias against or insensitivity to women, nor did he ever indicate that discrimination against women is appropriate, or even acceptable.

On the contrary, during these years, when he had no basis for knowing that his statements and actions would be subject to the intense scrutiny to which they are now being subjected, he was fair and nondiscriminating to all members of the section. He solicited and listened to my views, notwithstanding that we often disagreed, and, as best I recall, he related or responded to the other women in the section with the same courtesy and respect, treating us no differently than our male colleagues.

In fact, it is my clear impression that he actively encouraged women to participate in the work of the section. As chairman-elect, he appointed 6 women as chairs of committees, and 16 as vice-chairs of committees, and he appointed a woman to the 3-person nominating committee, which had the responsibility for selecting the following year's officers and council members.

When I served on the nominating committee several years later, I undertook as one of my assignments to poll past chairmen to get their views as to bright young, or not-so-young, rising stars. And I recall that Judge Scalia was very enthusiastic about women in leadership roles in the section generally, and very high on some women candidates in particular.

I should add that in the last few years I have appeared before Judge Scalia in oral arguments in the District of Columbia Circuit. And the traits that I discerned in the early eighties—being well prepared, analytically quick, and intellectually curious and fair—were very much evident in his performance on the bench.

I, therefore, urge your favorable consideration and confirmation of Judge Scalia to be Associate Justice on the Supreme Court.

Senator MATHIAS. Thank you, Ms. Katzen.

Mr. Fuller.

STATEMENT OF JACK FULLER

Mr. FULLER. I am Jack Fuller. I am editorial page editor of the Chicago Tribune.

Though I do not speak today in the voice of the newspaper, since it confines its say to the printed page, I should tell you at the outset that the Tribune has applauded Judge Scalia's nomination. In editorial published in the newspaper of June 18, 1986, the Tribune praised Judge Scalia's "reputation for intelligence, intellectual honesty and convincing argument" and went on to characterize him as "a lawyer's lawyer: meticulous, measured, determined to read the law as it has been enacted by the people's representatives rather than to impose his own preference upon it."

I am here——

Senator BIDEN. We would be surprised if you were here and it did not.

Mr. FULLER. I have known Judge Scalia for more—I do not know why you would be.

I have known Judge Scalia for more than a decade since working with him in the Department of Justice where I served as a special assistant to the Attorney General at that time, Edward Levi.

In the Department I worked with Judge Scalia closely on a wide range of issues of Federal legal policy, many of them difficult constitutional matters that touched on fundamental concerns of liberty and the structure of constitutional government.

Judge Scalia brought to bear the lawyerly virtues of attention to detail, close analysis and clear, direct expression.

He was openminded in the examination of legal questions, and scrupulously honest in the presentation of his views.

If character, intelligence, legal craftsmanship and a passionate regard for the tradition and responsibility of the law are the marks of excellence in a justice of the Supreme Court, then Judge Scalia will fit and honor that high office.

One of the important functions of the Supreme Court is to explain the law to the people it serves. Judge Scalia brings to this work a remarkably clear and vivid writing style. As a writer myself, I must tell you that I read Judge Scalia's articles and opinions with a deep sense of professional envy. The Supreme Court, like all institutions of self government, ultimately depends on public understanding and acceptance. Judge Scalia's gift for writing will serve the institution and the public well.

Finally, I do not believe, as some of my colleagues in journalism do, that Judge Scalia lacks the proper reverence for the value of free expression.

First of all, I do not think that we in the press should succumb to the temptation to behave like a single-interest lobby group, demanding lock-step agreement in every doctrinal dispute that touches upon its own particular interest. In a matter such as an evaluation of a person for a position on the Supreme Court, the press 'responsibility, like this committee's or the public's, is to measure the individual against the much broader and appropriate standard of character, skill, intelligence, and commitment to the rule of law.

Second, through my years of acquaintance with Judge Scalia, I have come to know him as a man utterly committed to free debate of public issues. As an executive branch official, as a writer, as an editor, and as a scholar, he has not only articulated his belief in the importance of free debate; he has lived it.

I have no doubt that as a Justice of the Supreme Court he will take serious the Court's responsibility as a guardian of the system of free expression.

Finally, I believe that a careful, lawyerly excellence, of the sort that has marked Judge Scalia's career, is the best indicator of what he will accomplish on the Supreme Court.

His care and caution and meticulousness are, like the law's, the best and most lasting defense against encroachments upon our liberties. I am more than willing to entrust what to me is the most cherished of our freedoms to an individual like Judge Scalia, whose whole being has been wrapped up in serving and honoring the American legal tradition.

Senator MATHIAS. Thank you, Mr. Fuller.

Senator Biden.

Senator BIDEN. Sir, is it usual for you to testify. I mean, is it a precedent?

Mr. FULLER. It is highly unusual for me to know very well a nominee for the Supreme Court of the United States. It is very unusual for me to testify on someone's behalf.

Senator BIDEN. Ms. Katzen, I want to speak to you later about the guy sitting behind me, and about what kind of job he did. I have been informed that I should disclose to the staff that my staff person used to be accountable to Ms. Katzen in her law firm. I would like to talk to you later about him, if I may.

Ms. KATZEN. Well trained, is he not?

Senator BIDEN. Well trained. He has done a heck of a job, as a matter of fact.

Ms. KATZEN. I am sure.

Senator **Biden**. Mr. Fein, is there a right of privacy in the Constitution?

Mr. **Fein**. There certainly is not in explicit terms. However, there are certain privacy values definitely protected by the Constitution. The first amendment, for example, protects absolutely the freedom of belief. It also protects a freedom of religion.

The fourth amendment——

Senator **Biden**. How about the ninth amendment?

Mr. **Fein**. The ninth amendment does not protect anything. Indeed, the Supreme Court was required to refer to it as having emanations and penumbras in order to define some substantive significance to the ninth amendment. A majority of the Supreme Court has never thought that it itself conferred any right of privacy, but privacy values are protected in the Supreme Court; not explicitly. It was intended to preserve certain core elements.

Senator **Biden**. Can you tell me what some of those rights of privacy are that are protected——

Mr. **Fein**. Certainly. The fourth amendment right against unreasonable searches or seizures.

Senator **Biden**. But they are all enumerated.

Mr. **Fein**. They are enumerated.

Senator **Biden**. Are there any unenumerated rights of privacy?

Mr. **Fein**. In the Constitution?

Senator **Biden**. Yes.

Mr. **Fein**. No.

Senator **Biden**. No more questions.

Thank you very much.

Senator **Mathias**. Senator Metzenbaum.

Senator **Metzenbaum**. Mr. Fein, I heard you on TV the other day when Senator Biden invited you to his office. I was just curious to know what this United Families deal is. How many thousands of members do you have?

Mr. **Fein**. I will provide you with a specific number if you would like that.

Senator **Metzenbaum**. I did not ask for a specific number. I wanted the thousands. Do you have 1,000, 5,000, 100?

Mr. **Fein**. I do not know, Senator.

Senator **Metzenbaum**. Is it not a fact, Mr. Fein, it is a paper organization. It is your organization, and it is just funded by some right wing conservatives. Is that not actually the fact?

Mr. **Fein**. No, I think that is absolutely false, Mr. Senator.

Senator **Metzenbaum**. Tell me the truth. Where do you get your money?

Mr. **Fein**. I did not found the organization. And I can refer you to those who run it on a day-to-day basis in Washington and provide any of the details with regard to the funding and the expenditures, et cetera.

But I had nothing to do with the foundation of this particular organization.

Senator **Metzenbaum**. But you are very smart. Tell us about the organization. What is it? I mean, it is just a name. I have never heard of it before.

Mr. **Fein**. I am not intimately familiar with the United Families of America. I can tell you, I had nothing to do with its foundation.

I have sympathy with their views in promoting family values. They contacted me and asked that I prepare testimony and represent them in these proceedings and that is my association with this organization.

Senator METZENBAUM. You were with Gray & Co. at one part of your life?

Mr. FEIN. At one time, yes, sir.

Senator METZENBAUM. Did you hold a position with this administration at any point?

Mr. FEIN. Yes, I did.

Senator METZENBAUM. What did you do?

Mr. FEIN. I was Associate Deputy Attorney General for 2 years during the first term of the Reagan administration. I served for 2 following years approximately at the Federal Communications Commission as general counsel.

Senator METZENBAUM. And who asked you to speak?

Mr. FEIN. United Families of America asked me to represent them here.

Senator METZENBAUM. Are you a private, practicing lawyer; is that it?

Mr. FEIN. Yes, I am.

Senator METZENBAUM. And you are just here as counsel for the organization, an organization about which you know absolutely nothing?

Mr. FEIN. I think that is an overstatement, but I am counsel for them at this proceeding, yes, sir.

Senator METZENBAUM. Well, tell me what you know.

I guess what I am really asking you is: You are asked to come here to speak on behaf of an organization.

Mr. FEIN. It is an organization that promotes the family values in the United States, as a matter of law and policy.

Senator METZENBAUM. Well, my understanding of the organization is that it is just a paper organization that does not exist, it does not have members. So I asked you how many members, you said you do not know. You are very smart. That is the second time I have said that, so I might pull you out in order to give me some indication as to, truly, what is the United Families Foundation if it is something more than a front organization?

Mr. FEIN. Mr. Senator, I gave you the complete reservoir of my knowledge as to the values it promotes and the fact that I had nothing to do with its inception as an organization. And I would be speaking on things of which I was ignorant if I hazarded a guess.

Senator METZENBAUM. Who is the president?

Mr. FEIN. Excuse me.

Senator METZENBAUM. Who is the president?

Mr. FEIN. Bob Bartleson is the one who I spoke with in regard to preparing the testimony and appearing here today and last week as well.

Senator METZENBAUM. He is the president, is he?

Mr. FEIN. I do not know what his particular title is. He is the one who operates the Washington office.

Senator METZENBAUM. I have no further questions.

Senator BIDEN. I have a couple of questions after you.

Mr. **Fein**. Mr. Chairman, could I ask that there be held open the record to permit the information to be included that would refute the allegation that the United Families of America is simply a paper organization?

Senator **Mathias**. The record will be open. And I think Senator Metzenbaum would be glad to have you provide that information.

Mr. **Fein**. Thank you, Mr. Chairman.

[The following was received for the record:]

BRUCE FEIN & ASSOCIATES

562 INNSBRUCK AVENUE, GREAT FALLS, VIRGINIA 22066
BRUCE FEIN PRESIDENT 703/759-5011

August 7, 1986

Senator Strom Thurmond
Chairman, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I testified on behalf of United Families of America on August 6, 1986 in support of Judge Scalia's nomination to be Associate Justice of the United States. During my testimony, Senator Howard Metzenbaum falsely suggested that United Families of America was a mere "paper organization" that I had concocted for some unstated purpose.

As I testified under oath at the hearing, I had no involvement in the formation of United Families of America. It is a substantial organization.

United Families of America was incorporated in Virginia in 1978. Its estimated budget for 1985 was $450,000, and its projected budget for 1986 is $500,000.

The Chairman of the Board of Directors is Cliff Cummings, 10303 Conejo Lane, Oakton, Virginia, 22124. Gordon Jones, Kent Bradford, and Susan Roylance complete the Board's membership. The staff of United Families of America include Bob Bartleson, Executive Director, Lowell Soury, Shaun Henry, and Chuck McFall.

The primary mission of United Families of America is lobbying the federal government in support of policies sympathetic to traditional family values and family life. A national grass-roots organization, United Families of America has devoted considerable effort to achieving tax reform for the family, preventing psychological abuse in the classroom, and voicing opposition to abortion.

The United Families Foundation is a section 501(c)(3) tax exempt organization. Organized in 1980 under South Carolina law, United Families Foundation has 40,000 to 50,000 members. The Foundation promotes acceptance and support for traditional family structures, values, and relationships. The main sources of financial support for the Foundation include The Anschutz Foundation, Mr. Roger Milliken, Miss Florence Manning, Mrs. Ruth Hallum, and Mr. Robert Perry.

I respectfully request that this letter be included in the record as a supplement to my August 6, 1986 statement supporting Senate confirmation of Judge Scalia as Associate Justice of the United States. If Senator Metzenbaum or any other Member of the Judiciary Committee desires further information about either United Families of America or United Families Foundation, I would be delighted to provide the same for inclusion in the record or otherwise.

Sincerely,

Bruce E. Fein

Bruce E. Fein

Senator **Metzenbaum**. Incidentally, may I just ask one more question?

According to the designation on our sheet, it indicates you are appearing on behalf of the United Families Foundation. You state you are appearing on behalf of United Families of America.

Is there a foundation——

I guess I am just asking you, what is the fact?

Mr. **Fein**. I am representing United Families of America. My understanding is that there is a foundation that is a separate organizational unit, but when the record is held open, I will provide the details on the relationship between the two.

Senator **Metzenbaum**. Thank you.

Senator **Mathias**. Senator Biden.

Senator **Biden**. Mr. Chairman.

Mrs. LaHaye, let me ask you. Concerned Women for America, which you stated is the largest women's organization, nonpartisan women's organization, I think, is the phrase you used; is your organization involved in the trial that is attempting to withdraw certain books from schools because they violate Christian values?

Mrs. **LaHaye**. We are involved in a trial in Tennessee. But let me just correct that for the record.

Senator **Biden**. I would like to know what it is.

Mrs. **LaHaye**. We are not trying to withdraw books from the school at all.

Senator **Biden**. What are you trying to do?

Mrs. **LaHaye**. We are simply asking for seven families to have the right to have an alternative textbook in the Hawkins County School District.

Senator **Biden**. And the alternative textbooks, for example——

Mrs. **LaHaye**. They requested the textbooks called, Open Court, published by Open Court. The readers that they are being asked to read in the school, or forced to read, is the Holt series readers.

Senator **Biden**. But your organization has no objection to the schools, for example, including the story of Leonardo da Vinci?

Mrs. **LaHaye**. No, not at all; that was false reporting.

Senator **Biden**. This press reporting——

Mrs. **LaHaye**. That is not correct.

Senator **Biden**. I mean, that is kind of crazy; you would agree, right?

Mrs. **LaHaye**. You are right. We are not that crazy.

Senator **Biden**. Or a visit from Mars should be taken out——

Mrs. **LaHaye**. No, those have all been misquoted.

Senator **Biden**. It says, the visit from Mars, for example, seemed to Mrs. Frost to embody, through transfer or telepathy, supernatural attributes that are properly God's alone, therefore the children should not read it.

You do not believe in that, do you?

Mrs. **LaHaye**. The things they were objecting to, really, causing them to experience other religions and not the history. They approve of the history. But they did not want to——

Senator **Biden**. Did that experience another religion?

Mrs. **LaHaye**. No, I am not saying that is. This is part of their testimony. They did not disapprove of the Three Bears, as some of the press reported they did.

Senator **Biden**. I see.

Mrs. **LaHaye**. Or Cinderella.

Senator **Biden**. Because it is kind of confusing. It says:

> Mr. Farris is one of four lawyers on the staff of Concerned Women for America who are representing a dozen Hawkins County residents who are seeking alternative books for their children. The Washington-based organization was founded by Beverly LaHaye, who is married to television evangelist Tim LaHaye, a strategist for the religious right. That is how it is characterized.

Mrs. **LaHaye**. One correction.

Senator **Biden**. In fairness to you, I am reading from the New York Times.

Mrs. **LaHaye**. He has never been a TV evangelist, but they can call him what they wish.

Senator **Biden**. I cannot read this writing, whoever gave me this note. So if you rewrite it, I can read it.

I cannot read the books or the writing; I am getting old.

It says, Concerned Women also paid a Tennessee lawyer to represent Mrs. Frost in a separate case earlier this year in which she was awarded $70,000 in damages by a jury for false arrest. The local police officer had arrested Mrs. Frost for trespassing when she came to try to remove one of her children from a reading class at school. The officials acknowledged that the arrest was not authorized by the local ordinance.

The textbooks are being defended here by lawyers retained by the insurance company of Hawkins County, by Tennessee Advocate General William H. Farmer, and by five lawyers of the prominent Washington firm of Wilmer, Cutler & Pickering. And the plot thickens. [Laughter.]

Ms. **Katzen**. It is worse than you suspect.

Senator **Biden**. The next thing I am going to find out is that my staff guy was on this case.

Is that the note you are passing me?

Ms. **Katzen**. If I may, Senator, I would note for the record that——

Senator **Biden**. Your husband was a school board lawyer?

Ms. **Katzen**. Yes, sir; my husband was the lead trial counsel for the school board on the other side of the case from Mrs. LeHaye.

Senator **Biden**. This is like Dallas.

Ms. **Katzen**. But I think it demonstrates an important point. As was mentioned this morning, Judge Scalia's qualifications are such that he has earned the respect of people across the political spectrun. Mrs. LeHaye and I are both appearing here today in support of Judge Scalia, and it may be the only thing we agree on.

Mrs. **LaHaye**. I think that would be very true.

Senator **Mathias**. At least there does not seem to be much diversity of opinion at Wilmer, Cutler & Pickering.

Senator **Biden**. The firm agreed to contribute its time and talent to the case after being approached by the People for the American Way, an American civil liberties lobby founded by television producer Normal Lear to monitor the religious right.

Well, you have helped me clear up what seemed to be an inconsistency. And at some point, if we have the time, I would like to know how you reach an editorial decision. But it is the first time in my 14 years here, other than speaking on a first amendment issue, that there has been an editor that showed up.

Mr. FULLER. I thought I was speaking on a first amendment issue.

Senator BIDEN. Oh, are you? You are speaking on behalf——

Mr. FULLER. I thought there had been a lot of concern on the part of this committee and some parts of the press about Judge Scalia's attitudes toward the first amendment.

Senator BIDEN. Yes, but you went way beyond that.

That is all right. I am just pointing out that I have never seen that before. There is nothing wrong with that. I welcome you here, I truly do.

Mr. FULLER. Thank you.

Senator BIDEN. Because after reading some of your editorials, I am as confused as you are listening to us.

Senator MATHIAS. I do not think we should forget the most recent editorial writer we had here.

Senator BIDEN. Who is that?

Senator MATHIAS. J. Harvie Wilkinson.

Senator BIDEN. That is true. How could I forget J. Harvie. I do not have any further questions. Thank you.

Senator MATHIAS. Senator Metzenbaum.

Senator METZENBAUM. I was not here when you spoke, Mrs. LaHaye. But did I hear somebody say that your organization is the largest women's organization in the country?

Mrs. LAHAYE. I am quoting what Time magazine said. Time magazine gave credit to that about 4 or 5 months ago.

Senator METZENBAUM. How many members are there in your organization?

Mrs. LAHAYE. We have 565,275 as of this morning, and it changes everyday.

Senator METZENBAUM. They are all dues-paying members?

Mrs. LAHAYE. Yes, they have all identified on paper that they want to be part of CWA.

Senator METZENBAUM. And are you the president?

Mrs. LAHAYE. Yes, I am; and the founder.

Senator METZENBAUM. And how do you get your membership?

Mrs. LAHAYE. Through many different means. Through personal appearances where I speak, through books I may have written, or contacts—we have area representatives all over the United States, and they solicit members in their area.

And when we have a court case like Senator Biden just referred to, that gives us new members because——

Senator BIDEN. I would not give him all your secrets.

Mrs. LAHAYE. OK; I will save a few.

Senator METZENBAUM. And where are you most active, north, south, or all over the country?

Mrs. LAHAYE. Oh, our biggest membership is in California. We are all over the United States.

Senator METZENBAUM. Did I hear you say that you were concerned about the school books that are used in the South?

Mrs. LAHAYE. No, that would be too general. The specific books, called the Holt series readers, that one series that is published for elementary school grades, that seven families have objected to. And they simply asked that the school board approve alternative books for them to read. Which other—the classes were reading three or four different kinds of books at one time. They asked for an alternative book for their children. The school board denied that request, and then expelled the children from school when they would not read the books.

Senator **METZENBAUM**. Let me ask you, do you think it would be good policy if outside groups, or in groups, for that matter, those who have children in school, started to try to tell the school boards where their children go to school—or even if they do not go to their school—what choice of books should be used in the classroom? Do you think that is good policy?

Mrs. **LAHAYE**. Well, I think it is not good policy for the education system becoming a wedge between the parent and the child which was what we were seeing happening.

Senator **METZENBAUM**. I know that point of view of yours, but I do not think you answered my question.

The question was do you think it is good policy for some group of parents in the school, or a group such as yours outside the school, to be telling a school board what books should or should not be?

Forgetting about what the books are, do you think that is a good policy?

Mrs. **LAHAYE**. Well, a good policy is a very general statement, and this happened many times. We had people reporting that the books they object to may have had a story of the Bible in it or creation in it. So it has been going on for a long time where parents have objected and tried to see that the school would support basically, basically what they are trying to teach their children at home without conflict.

Senator **METZENBAUM**. Well, I understand that. But I do not understand what kind of a miracle it would be if Concerned Women for American was at the school board advocating certain books be on or off the list, or that NOW would be there with another group of books, or concerned women lawyers would be there for another group of books——

Mrs. **LAHAYE**. Yes, sir; that was not the case, that was not what they were doing.

They merely asked for the open court series, which is already on the approved list for the Tennessee Education Association. It is already on their approved list. So it is not new books they would be purchasing. They asked that their children could be granted the privilege of reading those books.

Senator **METZENBAUM**. I just say that whenever I hear of somebody interfering with the choice of books for school, I do have some concerns. And maybe that is the right thing to do, but I myself am doubtful.

Mrs. **LAHAYE**. The courts will be deciding very soon.

Senator **MATHIAS**. We have two more panels who are anxiously awaiting to give their testimony.

Let me call on Senator Simon and see if he has any questions for this panel.

Senator **SIMON**. Just one question. My friend Jack Fuller, from the Chicago Tribune, mentioned this quote from Judge Scalia, written before he was a judge.

He says:

> The defects of the Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave it birth; that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate press.

Does that bother you at all?

Mr. FULLER. Well, let me tell you what I think about Judge Scalia's attitude toward the Freedom of Information.

My understanding of Judge Scalia, and it is from what I have read of what he has done and from reading his opinions, my understanding of his approach is that he is very differential to the legislative branch of Government in enforcing the rules that the legislative branch writes.

My prediction, and you can never predict these things very well, is that this Congress would have few difficulties with Judge Scalia overruling its intention in the enactment of legislation like the Freedom of Information Act. It is very fundamental to his approach that those decisions be left to the majoritarian institutions.

So he may have, and I think he does have—he does oppose parts of the Freedom of Information Act, but I do not think there is a very grave risk that he would try to eviscerate that law from the Court. That is just exactly the kind of approach he would not take, I think.

Senator SIMON. The statement indicates that the obsession with the press as the first line of defense against an arbitrary executive is at the root of defects in the Freedom of Information Act.

Mr. FULLER. Well, I am, of course, fully in favor of do-it-yourself oversight on the part of the press.

Senator SIMON. I would think so.

Mr. FULLER. But I also think that I understand what he was writing about, and what I think he is writing about is his view that the first line of defense of liberty is really in the majoritarian institutions of the government. That is through the separation of powers and those constitutional provisions that you have the first line of defense—the oversight, not of the press in his view, but the oversight of this institution.

I happen to think that the press plays a very important function in that whole process, but I think I understand what he is trying to drive at, too.

Senator SIMON. All right. I would just add that I am probably going to be voting for him. I do have some concerns in this whole first amendment area. His record so far, and it is a limited record, is not one which shows great sensitivity to freedom of the press and freedom of speech.

I have no further questions.

Senator BIDEN. Mr. Chairman, could I have 30 seconds?

Less I appear in an editorial, let me point out that I want to compliment you. I think your testimony, Mr. Fuller, warrants some considerable credibility in light of the positions you have taken on other nominees that have come up also. It clearly is one that demonstrates you have a consistent demand for excellence on the part of the judiciary, and I compliment you on your good judgment.

Senator MATHIAS. Did you say it was a breath of comprehension?

Senator BIDEN. Yes, it was the comprehension.

Senator **Metzenbaum**. The Chicago Trib is not making editorial endorsements yet in the Presidential Democratic primaries, are they?

Mr. **Fuller**. We certainly have not.

Senator **Metzenbaum**. I was hoping.

Senator **Mathias**. The Chair feels constrained to bring this hearing back to the subject.

Thank you all very much for being with us. We appreciate you being here.

Our fourth panel is Anne Ladky, executive director, Women Employed; Ms. Joan Messing Graff, executive director of the Legal Aid Society of San Francisco; Ms. Audrey Feinberg of the Nation Institute, of NY; Ms. Kate Michelman of the National Abortion Rights Action League.

Ms. **Feinberg**. Am I it?

Senator **Mathias**. You are the only one.

Will you please raise your right hand?

Do you swear that the testimony you will give in this proceeding will be the truth, the whole truth and nothing but the truth so help you God?

Ms. **Feinberg**. Yes, I do.

Shall I proceed?

Senator **Mathias**. As you know, our rules ask you to make a 3-minute oral presentation. Your full statement will appear in the record.

Senator **Simon**. Mr. Chairman, since the other members of the panel are not here, I assume we will enter their statements in the record?

Senator **Mathias**. Their statements will be received in the record if they are received by the committee in a timely fashion.

I might repeat that the record will be open until 4 o'clock on Friday afternoon.

TESTIMONY OF AUDREY FEINBERG, THE NATION INSTITUTE, NEW YORK, NY

Ms. **Feinberg**. Members of the committee, I am Audrey Feinberg, an attorney with the New York City law firm of Paul, Weiss, Rifkind, Wharton and Garrison, and I am appearing on behalf of The Nation Institute. It is a foundation dedicated to the protection of civil rights and civil liberties. The Nation Institute is deeply concerned by the record of Judge Scalia for two reasons.

First, a review of Judge Scalia's decisions reveals a record that is far removed from mainstream judicial thought. During his few years on the bench, Judge Scalia's rulings have reflected extreme views, far to the right of even traditional conservative legal opinions.

Second, Judge Scalia's decisions reveal a remarkably consistent record of failure to support civil rights and civil liberties.

I have examined Judge Scalia's opinions in 14 areas, including sex and race discrimination, freedom of speech and press, privacy, legal representation for the poor, Presidential power in foreign policy, gun control, criminal law, consumer protection, labor law, and other areas. In case after case, Judge Scalia has shown a closed mind and a relentless insensitivity to the needs of women, minorities, and the poor, and he has slammed the courthouse doors in the faces of the disadvantaged.

Further, Judge Scalia's record raises serious questions about whether he has a political agenda that is incompatible with the impartiality required of Supreme Court Justices. I will offer just a few examples.

On the subject of sex discrimination, Judge Scalia has taken a position that is even farther to the right than the views of Justice Rehnquist. Unlike Justice Rehnquist in the unanimous opinion of the Supreme Court, Judge Scalia's opinion is that sexual harassment in the workplace is not actionable sex discrimination. I refer the committee to the case of *Meritor Savings Bank* v. *Vinson.*

In addition, Judge Scalia imposes a high burden on all those who sue for race discrimination. The majority of Judge Scalia's court wrote that Judge Scalia's views on race discrimination were "without precedent," and they would "effectively eviscerate" the discrimination laws.

I refer to the case of *Carter* v. *Ducan-Huggins, Ltd.*

Further, Judge Scalia is firmly opposed to affirmative action, calling it "the most evil fruit of a fundamentally bad seed."

I have merely highlighted the callousness to civil rights that seems to animate Judge Scalia's approach to judging. There must be a conscience in the confirmation process.

We urge the members of this committee to weigh whether an extremist, even one as affable as Judge Scalia, belongs on the Supreme Court for the next generation.

Thank you, and I ask that my full written record be submitted to the committee.

Senator MATHIAS. It will.

[Prepared statement of Ms. Feinberg follows:]

TESTIMONY OF
AUDREY FEINBERC,
ON BEHALF OF THE NATION INSTITUTE
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
ON THE NOMINATION OF ANTONIN SCALIA
FOR ASSOCIATE JUSTICE OF THE SUPREME COURT

MR. CHAIRMAN and MEMBERS of the COMMITTEE:

I am Audrey Feinberg, consultant to the Supreme Court Watch project of the Nation Institute. I am also an attorney practicing at Paul, Weiss, Rifkind, Wharton & Garrison in New York City. Since 1984, Supreme Court Watch has monitored the record of nominees to the Supreme Court, providing information to the press, public interest groups and the Senate to foster a more informed debate concerning Supreme Court appointments. The Nation Institute is a non-profit private foundation that sponsors research, conferences and other projects on civil rights, civil liberties and public policy issues.

I have been studying Judge Scalia's views for over a year for the Nation Institute, and have read and analyzed virtually all of his judicial opinions as well as his important public statements.*

A review of Judge Scalia's decisions in the U.S. Circuit Court of Appeals for the District of Columbia shows a record that is far removed from mainstream judicial thought. During his few years on the bench, Judge Scalia's rulings have repeatedly espoused extreme views, far to the right of even traditional conservative legal thought. Judge Scalia's opinions not only reflect extreme results, but are based on a misconstruing of precedents and of accepted methods of legal analysis.

Further, Judge Scalia's decisions reveal a remarkably consistent record of failure to support civil liberties and civil rights, and of narrowly interpreting the Constitution. In case after case, Judge Scalia has shown a closed mind and continuing insensitivity to the needs of women, minorities and the poor. Since his first public statements on these issues until his most recent judicial opinions, Judge Scalia has shown no change or growth.

The Nation Institute has serious reservations about Judge Scalia's qualifications for the position of Associate Justice. His initial judicial record of extremism and steadfast opposition to enforcing basic constitutional rights -- in the name of strict construction -- demands that the Senate examine his political and judicial views with the strictest scrutiny before elevating him to the Supreme Court.

EXTREMISM IN JUDGE SCALIA'S OPINIONS

In this analysis, I aim to highlight the pattern of extremism that constitutes the core of Judge Scalia's decisionmaking. I present just a few examples.

First, in the area of sex discrimination, Judge Scalia has taken a position that is even farther to the right than the views of Justice Rehnquist, whom this Committee interviewed last week. The Supreme Court recently unanimously decided that sexual harassment in the workplace is actionable sex discrimination, in the case of Meritor Savings Bank v. Vinson 46 S. Ct. Bul. (CCH) B3183 (June 19, 1986). While the Court split on side issues, the majority opinion by Justice Rehnquist and the concurring and dissenting opinions all agreed that sexual harassment is actionable. Judge Scalia, in the court below, joined in a dissenting opinion that would have ruled the other way, holding that sexual harassment is not discrimination. Judge Scalia called the view that sexual harassment is discrimination "bizarre." 760 F.2d 1330 (1985) (dissenting).

A second example is in the area of racial discrimination. Judge Scalia is opposed to school busing and affirmative action, both tools for combating racial discrimination used by the current Supreme Court. He called affirmative action "the most evil fruit of a fundamentally bad seed." Washington University Law Quarterly (1979).

Judge Scalia also imposes a very high standard on all race discrimination plaintiffs. In the straightforward case of Carter v. Ducan-Huggins, Ltd., in which an individual sued her employer, the type of case generally allowed by conservatives, Judge Scalia, dissenting, would have ruled against the plaintiff. Judge Scalia's view was that "differential treatment" is insufficient to prove discrimination. In this case, the black plaintiff proved at trial that she had received a lower salary and lower bonuses than white employees, had her desk hidden in a back room and had been barred from staff meetings. According to Judge Scalia, this was insufficient to prove discrimination. 727 F.2d 1225 (1984) (dissenting). As the majority of Judge Scalia's court wrote, Judge Scalia's view was "without precedent" and would "effectively eviscerate" discrimination laws.

Another example of extremism is Judge Scalia's views on the First Amendment. In the important libel decision of Tavoulareas v. Piro, now vacated and pending before the full D.C. Circuit, Judge Scalia joined in an opinion that not only ruled against the press, but that harshly criticized Washington Post editor Robert Woodward's policy of seeking "hard hitting investigative stories." 759 F.2d 90 (1985) (MacKinnon, J.) vacated and rehearing en banc granted (June 11, 1985). To most conservatives and liberals alike, investigative journalism is a legitimate and respected practice -- but not to Judge Scalia.

In another libel case, Ollman v. Evans and Novak 750 F.2d 970 (1984) (dissenting), Judge Scalia referred to the landmark Supreme Court case protecting freedom of the press, New York Times v. Sullivan, as fulsome -- meaning "offensively excessive or insincere," "loathsome" and "disgusting."

As the above dissents and now vacated or reversed decisions demonstrate, Judge Scalia is often fundamentally out of step with mainstream judicial interpretations.

INSENSITIVITY TO CIVIL RIGHTS, CIVIL LIBERTIES AND CONSTITUTIONAL PROTECTIONS

I have analyzed Judge Scalia's judicial philosophy, as well as his record in fourteen areas: Libel and Freedom of the Press, Freedom of Speech, Government Secrecy, Race Discrimination, Sex Discrimination, Abortion and Privacy, Legal Representation for the Poor, Presidential Power in Foreign Policy, Gun Control, Criminal Law, Death Penalty, Consumer Protection, Labor, and Worker Safety. Over this wide range of significant legal subjects, Judge Scalia never wavers in his insensitivity and indifference to civil rights, civil liberties, and constitutional protections.

Libel and Freedom of the Press

Judge Scalia has repeatedly ruled against journalists in libel cases. In three important libel decisions, he has systematically attempted to curtail the workings of a vigorous and free press.

In the celebrated libel case of *Tavoulareas* v. *Piro*, the President of Mobil Oil Corporation and his son sued the *Washington Post* and others over articles which stated that the President of Mobil Oil used his influence to set up his son in the shipping business and then diverted some of Mobil Oil's shipping business to his son. Judge Scalia joined in the decision by Judge MacKinnon that ruled against the *Washington Post*. The decision has since been vacated and is pending before the full U.S. Circuit Court of Appeals for the District of Columbia. 759 F.2d 90 (1985) (MacKinnon, J.), *vacated and rehearing en banc granted* (June 11, 1985).

The decision in *Tavoulareas*, as noted above, was critical of the *Washington Post*'s policy of seeking "hard hitting investigative stories," holding that such policy provided evidence of "malice," an element of libel claims. Testimony concerning the Washington Post's policy had been given by editor Robert Woodward, who formerly helped break the story about the Watergate scandal. The decision put investigative journalists under a cloud of suspicion, potentially subjecting them to a wide range of libel suits.

The Tavoulareas decision was widely criticized, prompting columnist William Safire to call Judge Scalia "the worst enemy of free speech in America today," and columnist Anthony Lewis to describe the opinion as a "radical departure from existing law" and a "twisting of principle."

Judge Scalia also would have ruled against the press in the case of Ollman v. Evans and Novak, 750 F.2d 970 (1984) (dissenting), cert. denied, 105 S. Ct. 2662 (1985), in which a professor at the University of Maryland sued two conservative journalists for an article calling him a Marxist. In a six to five decision, the court dismissed the professor's case, ruling that "the challenged statements are entitled to absolute First Amendment protection as expressions of opinion." Judge Scalia, dissenting, would have allowed the professor to proceed to trial. As noted above, in his dissent, Judge Scalia referred to New York Times v. Sullivan, a landmark case protecting American press freedom, as "fulsomely assur[ing]" the press's interests. "Fulsome" is defined in the dictionary as: "offensively excessive or insincere," "offensive to the senses," "loathsome," and "disgusting."

In another libel decision, later reversed by the Supreme Court, Judge Scalia refused to dismiss a suit by a right-wing group that claimed it had been falsely accused of anti-semitism and fascism by journalist Jack Anderson. Judge Scalia decided that the press cannot win summary judgment, and thus dispose of a libel case early in the proceedings, if the plaintiff presents "reasonable" evidence that he was libeled. The Supreme Court decided that a plaintiff must present "clear and convincing" evidence of libel, a higher standard, to survive a motion for summary judgment. *Liberty Lobby, Inc.* v. *Anderson*, 746 F.2d 1563 (1984), *rev'd*, 106 S. Ct. 2505 (1986).

In all three of the important libel cases that have come before him, Judge Scalia has ruled against the press.

Free Speech

In the majority of his free speech cases, Judge Scalia has restricted First Amendment freedoms.

In an opinion dated the day after he was nominated to the Supreme Court, Judge Scalia approved the Reagan administration's labeling of three Canadian films on acid rain and the consequences of nuclear ~~freeze~~ war as "political propaganda." One of the three films, a documentary on ~~acid rain~~ nuclear war, ~~had been nominated for~~ won an Academy Award. The plaintiffs charged that the government labeling, which discouraged distribution of the films, violated the First Amendment. *Block* v. *Meese*, slip op. 84-5318 (June 18, 1986).

Further, in a dissent later upheld by a 7-2 decision of the Supreme Court, Judge Scalia wrote that free speech does not encompass non-verbal protests. Judge Scalia permitted the Park Service to remove a group that camped on the Mall in Washington, D.C. to draw attention to the plight of the homeless. *Community for Creative Non-Violence* v. *Watt*, 703 F.2d 586 (1983) (dissenting), *rev'd sub nom*. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984). Judge Scalia also joined in an opinion upholding a criminal fine imposed on a woman who stood on the White House sidewalk while holding a cloth banner. *United States* v. *Grace*, 778 F.2d 818 (1985) (*per curiam*). *But see* *Lebron* v. *Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (1984) (Bork, J.) (involving a clear cut prior restraint on speech).

Government Secrecy

Judge Scalia has repeatedly supported government secrecy, ruling against reporters and others attempting to get information.

In the significant case of In re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (1985), reporters sought access to papers filed in court in the libel case by the President of Mobil Oil against the Washington Post. Judge Scalia, writing the majority opinion, denied the reporters' request and upheld the court's right to keep the papers secret. Moreover, Judge Scalia ruled that there is no First Amendment right to see papers filed in a court case prior to the judgment, and there is at best a weak right to see papers after the judgment.

In addition, prior to coming to the bench, Judge Scalia criticized the 1974 amendments to the Freedom of Information Act which provide for public access to government files labeling them "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost/ Benefit Analysis Ignored." He further wrote:

> The defects of The Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth -- that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public, and its surrogate, the press.

Regulation (March/April 1982)

On the bench, Judge Scalia has repeatedly upheld government secrecy against requests for information made under the Freedom of Information Act. For example, Judge Scalia has decided that the F.B.I. need not disclose photographs of a peace march allegedly obtained while investigating Kennedy's assassination. Shaw v. F.B.I., 749 F.2d 58 (1984). He also joined in a decision by Judge Bork that limited access to F.B.I. and other files on the Rosenbergs, who were executed in 1951 for allegedly transmitting information to the Soviet Union about the development of the atomic bomb. Meeropol v. Meese, 790 F.2d 942 (1986) (Bork, J.).

Even in less highly visible cases, Judge Scalia has written opinions favoring government secrecy. He allowed the I.R.S. to withhold information, even when the taxpayer's name and identity were deleted. Church of Scientology v. IRS, slip op. 83-1856 (en banc May 27, 1986) (7-3 decision). He refused to order the government to turn over lists of eligible voters in a union election to the union. International Brotherhood of Teamsters v. National Mediation Board, 712 F.2d 1495 (1983). He also allowed the government to keep secret a liquor manufacturer's information return. Ryan v. Bureau of Alcohol, Tobacco and Firearms, 715 F.2d 644 (1983). He further would have kept secret documents involving foreign policy. Washington Post Co. v. U.S. Department of State, slip op. 80-2469 (Dec. 28, 1982) (denial of rehearing en banc) (dissenting), panel decision vacated as moot, 464 U.S. 979 (1983); but see, Arief v. U.S. Department of the Navy, 712 F.2d 1462 (1983) (Navy must disclose prescription drugs physicians prescribed to Congressmen).

Judge Scalia has also joined in several other opinions that have denied access to government files. Hill v. U.S. Air Force, slip op. 85-5805 (July 18, 1986) (per curiam) (Air Force need not search further for files on civilian employee); Weisberg v. Webster, 749 F.2d 864 (1984) (Wilkey, J.) (FOIA plaintiff's failure to respond to discovery results in dismissal of request concerning President Kennedy's assassination); Ripskis v. Department of Housing and Urban Development, 746 F.2d 1 (1984) (per curiam) (denies disclosure of employee evaluations); Center for Auto Safety v. EPA, 731 F.2d 16 (1984) (Richey, J.) (denies further disclosure of information on auto emmissions); Miller v. Casey, 730 F.2d 773 (1984) (Wilkey, J.) (denies disclosure of historical material on Albania during World War II); but see Public Citizen Health Research Group v. FDA, 704 F.2d 1280

(1983) (Edwards, J.) (remands for possible further disclosure of scientific studies on intraocular lenses).

In short, Judge Scalia narrowly interprets the Freedom of Information Act to deny disclosure of government information in the vast majority of cases that have come before him.

Race Discrimination

Judge Scalia opposes affirmative action and school busing as remedies for discrimination. He also imposes a high burden on those who bring lawsuits for race discrimination, even in straightforward cases involving individuals suing their employers.

In the case of Carter v. Duncan-Huggins, Ltd., as described above, a black employee of a fabric and furniture showroom proved that she had been treated differently from white employees -- she had received a lower salary, received lower bonuses, had her desk hidden in a back room, and been barred from staff meetings. The majority of the court decided that she had a valid claim for race discrimination. Judge Scalia, dissenting, would have dismissed the employee's claim because "differential treatment" is insufficient to prove discrimination. The majority of the court criticized Judge Scalia's opinion as "without precedent," stating that it would "effectively eviscerate" a major discrimination statute. 727 F.2d 1225 (1984) (dissenting).

Judge Scalia has also ruled against blacks asserting discrimination claims in several other cases: Toney v. Block, 705 F.2d 1364 (1983); Poindexter v. F.B.I., 737 F.2d 1173 (1984) (concurring in part and dissenting in part); Morris v. Washington Metropolitan Area Transit Authority, slip op. 84-5306 (Jan. 17, 1986) (Bork, J.). In a claim of reverse discrimination by white firemen, Judge Scalia joined the majority in overturning the lower court's trial verdict to rule in favor of the whites. Bishop v. District of Columbia, 788 F.2d 781 (1986) (Silberman, J.).

On the issue of affirmative action, Judge Scalia, prior to coming to the bench, wrote:

> I am, in short, opposed to racial affirmative action for reasons of both principle and practicality.

Judge Scalia then went on to call affirmative action "the most evil fruit of a fundamentally bad seed." Washington University Law Quarterly (1979).

Judge Scalia, prior to coming to the bench, also strongly complained about court-imposed school busing to desegregate schools, stating:

> In the busing cases, which you mentioned, there was no need for the courts to say that the inevitable remedy for unlawful segregation is busing. Many other remedies might have been applied.

An Imperial Judiciary: Fact or Myth, American Enterprise Institute (Dec. 12, 1978).

Sex Discrimination

Judge Scalia has shown himself to be insensitive to victims of sexual harassment and sex discrimination.

As noted above, the Supreme Court recently ruled unanimously that sexual harassment is actionable discrimination under the civil rights laws, although it then split on side issues such as what evidence is admissible in sexual harassment trials. In a dissent from a denial of a motion for a hearing *en banc* below, Judge Bork, joined by Judges Scalia and Starr, suggested that sexual harassment claims are *not* actionable discrimination. The opinion notes "the awkwardness of classifying sexual advances as 'discrimination.'" The opinion goes on to state that the civil rights laws do not protect women from unwelcome lesbian advances, and:

> [t]hat bizarre result suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender.

Vinson v. Taylor, 760 F.2d 1330 (1985) (dissenting), aff'd, Meritor Savings Bank, FSB v. Vinson, 46 S. Ct. Bul. (CCH) B3183 (June 19, 1986). Therefore, Judge Scalia's views on sexual harassment were rejected unanimously by the Supreme Court.

In another case, Judge Scalia affirmed a jury's finding of no sexual harassment, without reaching the issue of whether sexual harassment is actionable discrimination. Bouchet v. National Urban League Inc., 730 F.2d 799 (1984).

Also, Judge Scalia joined in an opinion that refused to invalidate a company's policy of forcing women of childbearing age to choose between being sterilized or losing their jobs. The jobs entailed possible exposure to lead. Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co., 741 F.2d 444 (1984) (Bork, J.).

In addition, Judge Scalia opposes affirmative action as a remedy for sex discrimination, writing:

> Sex-based affirmative action presents somewhat different constitutional issues [than racial affirmative action] but it seems to me an equally poor idea.

Washington University Law Quarterly (1979).

Abortion and Privacy

Judge Scalia is firmly opposed to a woman's legal right to abortion, as enunciated in the Supreme Court case of Roe v. Wade, 410 U.S. 113 (1973).

While Judge Scalia has not decided an abortion case, he discussed his views about abortion in a debate, stating:

> In the abortion situation, for example, what right exists - the right of the woman who wants an abortion to have one, or the right of the unborn child not to be aborted?
>
> * * *
>
> But the courts have enforced other rights, so-called, on which there is no societal agreement, from the abortion cases, at one extreme, to school dress codes and things of that sort. There is no national consensus about those things and there never has been.

> The courts have no business being there. That is one of the problems; they are calling rights things which we do not all agree on.

An Imperial Judiciary: Fact or Myth, American Enterprise Institute (Dec. 12, 1978).

Joining in an opinion by Judge Bork, Judge Scalia was highly critical of the Supreme Court's privacy decisions, stating that "no principle is discernible in [the] decisions." Dronenburg v. Zech, 746 F.2d 1579 (1984) (Bork, J., denial of rehearing en banc) (upholding Navy regulation discharging homosexuals).

Judge Scalia also joined in an opinion that authorized the Reagan administration to cut off government funds to Planned Parenthood in Utah. Instead, the funds would go to the Utah State Department of Health, which had a history of refusing to provide confidential family planning services to minors. Planned Parenthood Association v. Schweiker, 700 F.2d 710 (1983) (McGowan).

Legal Representation for the Poor

Judge Scalia has proved insensitive to the needs of the poor for legal representation to protect their rights.

In a dissenting opinion, Judge Scalia would have dismissed a poor woman's sex discrimination claim because she did not have the funds to travel from Missouri to Washington, D.C. for trial. The woman said she would have sufficient funds in a month. Her poverty resulted from her being fired from her job as a saleswoman, and she alleged that she was fired because her employer wanted an all-male salesforce. The majority of the Court granted the woman a continuance of her trial date. Trakas v. Quality Brands, Inc., 759 F.2d 185 (1985) (dissenting).

Judge Scalia also joined in an opinion that authorized the government to terminate funding to the National Juvenile Law Center, a nonprofit group that brought suits on behalf of children. The Law Center alleged that the government was attempting to halt litigation pending against it. National Juvenile Law Center v. Regency, 738 F.2d 455 (1984) (per curiam).

Presidential Power in Foreign Policy

Judge Scalia has closed the courthouse doors to cases involving foreign policy or military policy. He grants the President almost complete power to decide issues of foreign or military policy, to the exclusion of the courts and Congress.

In the case of Sanchez-Espinoza v. Reagan, 770 F.2d 202 (1985), a group of Congressmen and Nicaraguan citizens sued to stop the Reagan Administration from sending secret aid, channeled through the C.I.A., to the Contras in Nicaragua. Congress had refused to appropriate such aid. Judge Scalia ruled that he would not reach the merits of the case, deciding that the courts should not get involved in such issues.

In the case of Arellano v. Weinberger, Honduran citizens sued to stop the seizure of their ranches for use as sites for military bases. The majority of the court permitted the case to proceed. Judge Scalia, dissenting, would not have let the court get involved in a military issue. As he wrote, "we cannot expect or require the Commander-in-Chief to take us (much less the plaintiffs) into his confidence regarding the activities now in hand." 745 F.2d 1500 (1984) (dissenting), vacated and remanded, 105 S.Ct. 2353 (1985), on remand, 788 F.2d 762 (1986) (dismissed as moot).

A notable exception to Judge Scalia's general deference to the President, is a dissenting opinion to a denial of a rehearing en banc, that would have heard the claims of Japanese-Americans interned during World War II. Judge Scalia and three other judges joined in an opinion by Judge Bork that criticized a "rule of absolute deference to the political branches whenever 'military necessity' is claimed however irrelevant and however spurious." Hohri v.

United States, slip. op. 84-5460 (June 13, 1986) (Bork, J. dissenting) (denial of rehearing en banc). Apparently Judge Scalia is willing to second-guess a past President, but not President Reagan. He has consistently supported President Reagan's executive power to conduct foreign policy in Latin America.

Gun Control

Judge Scalia has increased the availability of handguns in this country.

Judge Scalia ruled that under the Gun Control Act, the federal government could issue firearms dealers' licenses to people without bona fide commercial enterprises and without separate business premises and significant commercial operations. National Coalition to Ban Handguns v. Bureau of Alcohol, Tobacco & Firearms, 715 F.2d 632 (1983).

Judge Scalia also refused to allow the widow of a robbery victim killed with a stolen gun to sue the owner of the unregistered gun. Romero v. National Rifle Association, 749 F.2d 77 (1984).

Criminal Law: Exclusionary Rule

Judge Scalia has strongly criticized the exclusionary rule, which requires judges to exclude from criminal trials evidence obtained by unconstitutional means.

In a dissenting opinion in a case involving double jeopardy issues, Judge Scalia made a special point of attacking the exclusionary rule, which was not at issue. He harshly criticized the majority's opinion because it will "bring the criminal law process into greater public disrepute than the exclusionary rule, . . ." and it will "more certainly release the guilty than does the exclusionary rule." United States v. Richardson, 702 F.2d 1079 (1983) (dissenting), rev'd, 468 U.S. 317 (1984). But see United States v. Lyons, 706 F.2d 321 (1983) (Edwards, J.) (simply enforcing, but not expressly approving of the exclusionary rule).

Death Penalty

Judge Scalia strongly supports the death penalty. Prior to coming on the bench, Judge Scalia disagreed with the Supreme Court's death penalty opinions, stating:

> An example would be the Court's decision on capital punishment. There is simply no historical justification for that, nor could the Court claim to be expressing a consensus of modern society. It is just not true.

An Imperial Judiciary: Fact or Myth, American Enterprise Institute (Dec. 12, 1978).

Further, Judge Scalia dissented from the majority of the court's decision that the FDA was obligated to regulate lethal injections, writing that the majority was enlisting the F.D.A. in "preventing the states' constitutionally permissible imposition of capital punishment." Chaney v. Heckler, 718 F.2d 1174 (1983)(dissenting), rev'd, 105 S. Ct. 1649 (1985).

Consumer Protection

Judge Scalia has denied consumers' claims for better labeling of food and has often closed the courthouse doors to suits by consumers.

Judge Scalia decided that meat products need not be labeled to indicate mechanical deboning, which leaves some bone in products such as frankfurters and sausages. Community Nutrition Institute v. Block, 749 F.2d 50 (1984).

Further, Judge Scalia wrote that consumers had no standing to sue the government over orders that raised the price of milk. Community Nutrition Institute v. Block, 698 F.2d 1239 (1983) (concurring in part and dissenting in part), rev'd, 467 U.S. 340 (1984). He also held that a consumer unrepresented by a lawyer could not initiate a second suit concerning a defective car, when his first pleadings were deficient. Dozier v. Ford Motor Co., 702 F.2d 1189 (1983).

Labor

In a series of significant labor cases, Judge Scalia restricted unions' ability to sue on behalf of their members, to enforce collective bargaining agreements, and to organize a workforce.

In an important decision joined by Judge Scalia, and then reversed by the Supreme Court, Judge Scalia would have denied unions standing to sue on behalf of their members in many circumstances. In this case, the union was suing to obtain government training aid for auto workers laid-off due to competition from foreign imports. International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Donovan, 746 F.2d 839 (1984) (Haynsworth, J.), rev'd, 91 L. Ed. 2d 228 (1986). In a companion case, Judge Scalia decided that courts do not have the power to review the Labor Department's allocation of training aid to workers. 746 F.2d 855 (1984), cert. denied, 106 S. Ct. 81 (1985). See also California Human Development Corp. v. Brock, 762 F.2d 1044 (1985) (concurring) (court cannot review distribution of funds to states for training of migrant farm workers.)

In another important case, Judge Scalia effectively destroyed the benefit to unions of many collective bargaining agreements. Judge Scalia joined in an opinion upholding the NLRB's ruling that an employer can shift work to a non-union division when a union fails to agree to midterm contract concessions. The NLRB's position was the result of some deft political maneuvering. The NLRB had initially ruled in favor of the union in 1982, but then snatched the case back from the courts and changed its mind in 1984, after a majority of its members became Reagan appointees. International Union, United Automobile, Aerospace and Agricultural Implement Workers v. NLRB, ("Milwaukee Springs") 765 F.2d 175 (1985) (Edwards, J.).

In addition, Judge Scalia restricted a union's ability to organize a workforce. Judge Scalia joined in an opinion holding that even if "an employer has committed, 'outrageous' and 'pervasive' unfair labor practices" during an organizing campaign, the NLRB has no power to grant the union bargaining status absent a manifestation of majority employee support. Conair Corp. v. NLRB, 721 F.2d 1355 (1983) (Ginsburg, J. and Wald, J.), cert. denied, 467 U.S. 1241 (1984).

In a dispute between a union and an individual worker, as opposed to a union and an employer, Judge Scalia sided with the union against the individual. Judge Scalia joined in a decision that dismissed a suit by an employee who lost her job when a union boycotted Soviet cargo in protest of the Soviet invasion of Afghanistan. Charvet v. International Longshoremen's Association, 736 F.2d 1572 (1984) (Edwards, J.).

Judge Scalia has issued mixed opinions on employers' obligation to bargain. E.g., Department of the Treasury v. FLRA, slip op. 83-1355 (June 7, 1985), (employer need not bargain with union); American Federation of Government Employees v. FLRA, 702 F.2d 1183 (1983) (employer must bargain with union). Judge Scalia has also ruled for both unions and employers regarding unfair labor practices. E.g., see National Association of Government Employees v. FLRA, 770 F.2d 1223 (1985) (union); Road Sprinkler Fitters Local Union No. 669 v. NLRB, 778 F.2d 8 (1985) (employer); Drukker Communications, Inc. v. NLRB, 700 F.2d 727 (1983) (employer).

Worker Safety

Judge Scalia generally refuses to punish companies for violating worker safety standards.

In one case in which Judge Scalia dissented, the court fined a manufacturer of anti-tank test missiles $10,000 for unsafe working conditions causing an explosion that injured six workers. Ensign-Bickford Co. v. OSHRC, 717 F.2d 1419 (1983) (dissenting), cert. denied, 466 U.S. 937 (1984).

In at least two other cases, Judge Scalia ruled with the majority of the panel against worker safety. *Gates & Fox Co.* v. *OSHRC*, 790 F.2d 154 (1986) (Scalia, J.); *In re United Steel Workers of America*, 783 F.2d 1117 (1986) (*per curiam*). *See Donovan* v. *Williams Enterprises Inc.*, 744 F.2d 170 (1984) (Bork, J.) (ruling in part against employer and in part for employer); *but see Brock* v. *Cathedral Bluffs Shale Oil Co.*, slip op. 84-1492 (July 29, 1986).

Judicial Philosophy

Judge Scalia is a strong advocate of judicial restraint -- limiting the role of courts in our society and restricting access to the courts. These restrictions prevent individuals from suing to uphold their civil liberties and civil rights, and in effect promote the strong in our society over the weak.

Judge Scalia's view of judicial restraint includes a narrow interpretation of standing rules and other technical legal concepts resulting in greatly restricted access to the courts. This restricted access is particularly damaging to individuals and public interest groups trying to sue to protect their rights. *E.g.*, *Center for Auto Safety* v. *National Highway Traffic Safety Administration*, slip op. 85-1231, 85-1348 (June 20, 1986) (dissenting) (denying standing to sue over fuel economy standards for cars and light trucks); *International Union, United Automobile, Aerospace & Agricultural Implement Workers* v. *Donovan*, 746 F.2d 855 (1984) (Haynsworth, J.), *rev'd*, 91 L. Ed. 2d 228 (1986) (denying standing to union suing for training benefits for its members).

Judge Scalia's justification for judicial restraint is that the unelected courts should defer to the democratically elected branches. However, in practice, Judge Scalia generally defers only to the President and his unelected bureaucracy, and not to Congress. *E.g.*, *Sanchez-Espinoza* v.

Reagan, 770 F.2d 202 (1985) (approving President Reagan's aid to Nicaragua over the objection of Congressmen).

CONCLUSION

Judge Scalia's opinions on a wide range of issues reflect extreme conservative views that are outside the mainstream of established judicial analysis. Moreover, he has demonstrated a lack of commitment to civil rights and liberties and has shown no potential for change on any of these positions.

As a foundation dedicated to the promotion of civil rights and liberties and to the enforcement of the Constitution, the Nation Institute is deeply disturbed by the record of Judge Scalia. If confirmed, Judge Scalia is likely to serve on the Supreme Court into the twenty-first century. With this in mind, the Senate should carefully evaluate whether Judge Scalia's restrictive views on the basic protections of our Constitution are best suited for guiding the nation, not just for today, but for far into the future.

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* I gratefully acknowledge the research assistance of Nancy DiFrancesco in preparing this testimony.

Senator MATHIAS. Senator Biden.

Senator BIDEN. Ms. Feinberg, you cited 10 or 12 areas that you looked into his record on.

Has he decided cases in every one of those areas?

Ms. FEINBERG. Yes, he has. He has had at least several cases in all of these areas, and in case after case, he has consistently ruled against civil rights issues, against civil liberties, against women, against blacks, and against the poor.

Senator BIDEN. Let me ask you. Your conclusion is that he in fact is extreme. Is that the phrase you used, or what was the phrase you used?

Ms. FEINBERG. Well, I would agree that he is indeed extreme. And I would in particular point to the sexual harassment case where the Supreme Court recently unanimously ruled that sexual harassment is discrimination. Well, they split on some side issues, and the Court unanimously felt that that in fact was discrimination and, indeed, that opinion was authored, the majority opinion in that case was authored by Justice Rehnquist. And Judge Scalia would not go along with that.

I think someone that is far to the right of every Judge on the current Supreme Court would have to be labeled extreme.

Senator BIDEN. Do you believe that it is his agenda to overrule *Roe* v. *Wade?*

Ms. FEINBERG. Well, he has not explicitly stated anywhere whether he would overrule *Roe* v. *Wade.* He has very harshly criticized the decision, and I think he has made his views on abortion clear. And he has also disparaged the landmark privacy decisions of the Supreme Court, including the *Griswold* case and cases that had nothing to do with abortion. So I think we would have to be extremely concerned about whether he would overrule *Roe* v. *Wade.*

Senator BIDEN. Why do you not tell me what he said again in the *Vinson* v. *Taylor* case? I have that language somewhere.

Ms. FEINBERG. The holding of that case was that sexual harassment was not actionable sex discrimination. And I believe he labeled the idea that it might be actionable as "bizarre."

His view was that the civil rights statutes were not broad enough to encompass something as sexual harassment. I think that is quite a remarkable idea because the standard method of constitutional construction is that civil rights statutes and all remedial statutes shall be interpreted broadly.

The idea that something as horrible and as awful for the victims that experience it as sexual harassment is not considered sex discrimination is quite an unusual proposition.

Senator BIDEN. Did he write the decision?

Ms. FEINBERG. I believe that that was a decision that was written by Judge Bork, in which he joined. It was a 7-to-3 decision of the D.C. Circuit Court of Appeals.

And then it was overruled. That viewpoint was unanimously ruled against by the Supreme Court, which was a 5 to 4 decision, and for which Justice Rehnquist wrote the majority opinion. And the Court was split on some evidentiary issues, but they were unanimous on the view that sexual harassment is discrimination.

Senator **Biden**. Now, does he say in that decision that sexual harassment is not—let me read and I—what language do you rely upon for him for the suggestion? I am not doubting you.

Ms. **Feinberg**. I think I have one quote here which might clear that up.

Senator **Biden**. OK.

Ms. **Feinberg**. In the *Vinson* case, in his dissent, the opinion which Judge Scalia joined said he was discussing the fact that the civil rights laws might not protect women from unwelcome lesbian advances. And then he said, "That bizarre result suggests that Congress was not thinking of individual harassment at all, but of discrimination and conditions of employment because of gender."

So it seems pretty clear to me from that that he is saying that Congress which had passed title VII and the other sex discrimination statutes did not contemplate that they would cover sexual harassment, and that indeed they should not cover sexual harassment.

Senator **Biden**. The case in question was the——

Ms. **Feinberg**. That is the case of *Meritor Savings Bank* v. *Vinson*.

Senator **Biden**. Yes.

Ms. **Feinberg**. In the court below, it had the name of *Vinson* v. *Taylor*.

Senator **Biden**. Right.

How about the *Bouchet* v. *National Urban League*? Are you familiar with that where Judge Scalia affirmed the jury's finding of no sexual harassment without reaching the issue of whether sexual harassment is actionable discrimination?

Ms. **Feinberg**. Yes. Some people have cited that case as showing that Judge Scalia may in fact believe that sexual harassment is actionable.

However, what that case found was against the plaintiff, and it reached a finding of no sexual harassment. And therefore I don't think you can infer any views on whether sexual harassment is actionable or not. In fact, that case held that on the particular facts before it, there was no sexual harassment. And it never at all discussed the broader question of whether sexual harassment is actionable sex discrimination.

The Court did not need to get that far in the *Bouchet* case, because they were ruling against the plaintiff and found, as a matter of fact, that there was no sexual harassment.

Senator **Biden**. It may seem like an unfair question I am about to ask you. But if the judicial nominee were here, and they were not on the Court but they were being nominated for the Supreme Court, and they said in testimony that they in fact thought that *Roe* v. *Wade* was wrongly decided, but on all other counts they seemed to have positions recognizing the rights of women in this country, would you testify against that person merely because they disagree on *Roe* v. *Wade*?

Ms. **Feinberg**. I would certainly reconsider my testimony. I do not think you can use a litmus test of any one particular issue in judging a nominee. And, of course, it would depend on Judge Scalia's views on every other issue.

Roe v. *Wade* is an important case and a longstanding case and one that is deeply respected by women and women's groups. However, again I think you have to look at the overall record of the nominee. And in this case we are not talking about one case or even one issue. We are talking about issues ranging from women's rights to race discrimination, to libel and free press, to labor law, to consumer protection, and in all of issues Judge Scalia has come out against people suing to enforce their rights.

So, as far as looking at his record, and I would like to point out that it was hard to determine his views from the questioning by the Senators here. He seemed to be somewhat evasive and reluctant to go on the record with his views. He kept saying I refer you to my record. Look at my record and my writings to see what your opinion of me is going to be.

And what I have done here is look at his record. And in subject after subject, his record has been against civil rights, against civil liberties, and against the poor.

Senator **Biden**. Ms. Feinberg, are you an attorney?

Ms. **Feinberg**. Yes, I am; I am practicing at the New York City law firm of Paul, Weiss, Rifkind, Wharton & Garrison.

Senator **Biden**. How long have you been practicing?

Ms. **Feinberg**. Five years.

Senator **Biden**. You are very articulate.

Ms. **Feinberg**. Thank you.

Senator **Biden**. It's presumptuous of me to suggest, but you are.

Let me ask you, then. Do you believe that Judge Scalia has a closed mind on these issues, that he is not subject to being convinced or changed in his mind?

Ms. **Feinberg**. I think you are always in a difficult position in trying to predict what a judge will do in the future. But with Judge Scalia we can only look at his past record, and his past record does indicate a closed mind on certain issues—in particular, race discrimination, sex discrimination, Freedom of Information Act issues, free press issues.

And I would have to say, given his remarkably consistent rulings in this area, that he does have a closed mind, yes.

Senator **Biden**. Did your organization take a position on Justice Rehnquist?

Ms. **Feinberg**. No, we did not.

Senator **Biden**. Is it appropriate to ask you why you did not, and why you did on Scalia?

Ms. **Feinberg**. Well, the reason is because institutionally we set up a system of volunteer attorneys, such as myself, to study potential Supreme Court nominees, and each of us spent the better part of a year studying someone who might get nominated to the Supreme Court, and we never expected that Justice Rehnquist would be coming here for an additional nomination proceeding.

So that's the only reason we did not. I might add, though, that someone did testify several years ago when Justice O'Connor was nominated for the Supreme Court.

Senator **Biden**. Are you at liberty to tell us who else is coming up next? [Laughter.]

It scares me. How many people have you looked at?

Ms. **Feinberg**. Well, we have a list of something like 15 members, and you are welcome to hear the names, if you want. It's our guess, as much as anyone else's.

Senator **Biden**. Well, you were right on one.

Ms. **Feinberg**. I seemed to hit the right name, since I chose to spend my time studying Judge Scalia for the past year.

Senator **Biden**. That's remarkable, thank you.

Senator **Mathias**. Senator Metzenbaum.

Senator **Metzenbaum**. Ms. Feinberg, in the short time that I've had to peruse your written statement, I have to tell you that it's the best statement I've seen submitted by anybody either in connection with Justice Rehnquist or Justice Scalia.

Senator **Biden**. She's been working on it a year. [Laughter.]

Senator **Metzenbaum**. With all due respect, I'm afraid if my colleague had 3 years he wouldn't have done as well. Neither would I.

Senator **Biden**. You probably wouldn't be able to read it.

Senator **Metzenbaum**. You have succinctly stated the issue in a number of areas, and then, having done that, made your point.

Ms. **Feinberg**. I appreciate the compliment, and again I would give part of the credit to the Nation Institute which set up a system so that we had sufficient time and resources to study the nominee.

If we had tried to do a study like this in the last 2 or 3 weeks since Judge Scalia was nominated, it would have been impossible. Because of the Nation Institute's program of monitoring potential nominees, we have been able to do a comprehensive look like this.

Senator **Metzenbaum**. When Mr. Fein appeared, I asked him what his group is. What is the Nation Institute?

Ms. **Feinberg**. The Nation Institute is a private foundation. It is a research organization with primary concerns on civil rights and civil liberties. It sponsors conferences, research, and investigations.

One of its projects is called the Supreme Court Watch Project, and that project monitors the records of potential Supreme Court nominees.

If you want a more detailed explanation, the executive director of the Nation Institute, Emily Sack, I think is sitting right behind me, and she could explain more fully what their work is.

Senator **Metzenbaum**. How is it funded?

Ms. **Feinberg**. Well, it's a private foundation, and it receives donations from various sources, primarily from people who are interested in civil rights and civil liberties.

Senator **Metzenbaum**. Tell me, in connection with the *Tavoulareas* decision, you pointed out that Judge Scalia's position was extremely tough, as far as freedom of the press is concerned, and, as I read your submission, you indicated that columnist Safire had called Judge Scalia "the worst enemy of free speech in America today," and columnist Anthony Lewis described the opinion as "a radical departure from existing law" and a "twisting of principle."

Would you tell us a bit about the *Tavoulareas* decision and Judge Scalia's role in that decision?

Ms. **Feinberg**. Sure; that decision involved the president of Mobil Oil Co. who was suing for libel over an article that claimed that he had set his son up in the shipping business, and had diverted some of Mobil's shipping business to his son.

Judge Scalia joined in the opinion by Judge McKinnon that ruled against the Washington Post on the issue of libel in that case. And I'd like to point out that that decision has now been vacated and is pending before the full District of Columbia Circuit Court of Appeals.

So the opinion joined by Judge Scalia is not currently the law of the land.

Not only did Judge Scalia rule against the press in that case, but, more importantly, he held that investigative reporting is evidence of malice—the phrase used is "hardhitting investigative stories"—and that searching for such stories is evidence of malice, one of the elements of libel claims.

Senator **Metzenbaum**. Just to elaborate upon that, the mere fact that a newspaper does, has investigative reporters, is in and of itself proof of malice?

Ms. **Feinberg**. That was the holding of the decision, yes.

Senator **Metzenbaum**. And that was Judge Scalia's holding.

Ms. **Feinberg**. Yes, it was.

Senator **Metzenbaum**. To your knowledge, has any other court ever indicated that the mere fact that a newspaper has investigative reporters is in and of itself proof of malice?

Ms. **Feinberg**. No other court has ever done that. Indeed, that is what prompted the strong criticisms from columnists and others about this decision.

Investigative reporting is considered a respectable and legitimate practice of the press. It merely means that the press is digging hard for answers, that they ask questions, that they look at documents, that they do the kind of reporting that any good reporter should do. The idea that investigative reporting is evidence of malice would be news to most reporters. I think when this decision came out it was news to other judges.

Investigative reporting is something that is necessary for the press to do a good job. And it was never disparaged as much as it was in this strong opinion by Judge Scalia.

Senator **Metzenbaum**. If you follow that to its logical extreme, no newspaper could afford to have investigative reporters because every plaintiff would then have a simple way to get around the earlier decision of the Supreme Court.

Ms. **Feinberg**. I think if this decision was the law of the land, which again it's currently vacated so it is not—but if Judge Scalia's decision were the law, reporters would be opening themselves up to libel suits for every story that they wrote that could be called investigative, and the newspaper would go out of business paying millions of dollars in libel fines in a very short time.

Senator **Metzenbaum**. Let's skip over to a latter point of your memorandum, about Judge Scalia's being insensitive to the needs of the poor for legal representation to protect their rights.

Could you tell us about the dissenting opinion that the Judge had in the case that's to be found on page 17?

Ms. **Feinberg**. Yes, the case of *Trakas* v. *Quality Brands*. In that case Judge Scalia would have dismissed a poor woman's sex discrimination claim because she did not have the funds to travel to the place of trial. She said that she would have the funds within 1 month, because her husband had just gotten a new job, and she asked for a 1-month continuance of her trial date. The majority of the District of Columbia Circuit Court went along with her and granted the continuance, but Judge Scalia wrote a separate dissenting opinion that would have denied her continuance.

I also would like to point out that the woman's poverty resulted from her being fired from her job as a saleswoman, and she claimed the firing was an act of sex discrimination, that she had been fired because her employer wanted an allmale sales force. Because she was out of a job, she did not have the funds to travel to trial. I believe she was traveling from Missouri to Washington for her trial. And she could not afford that, and she wanted a 1-month extension of time.

Rather than grant her a 1-month extension of time, Judge Scalia issued a very harsh decision dismissing her entire case and throwing her out of court.

This case also is the reason why I said he has closed the courthouse doors to the disadvantaged.

Senator METZENBAUM. How do you explain that about Judge Scalia? He appears before us, he's a family man, he seems to be a very sensitive individual, and yet the harshness of that decision with respect to dismissing the case because a woman didn't have the money after she had been fired in order to travel from Missouri to Washington to present her case—it's just somewhat difficult for me to comprehend.

Ms. FEINBERG. I think perhaps it cannot be reconciled with his personal attributes. I think this committee has heard and appreciated his affability, his congeniality, his integrity. But those are not the only qualities that this committee should be looking over. You have to look at his record and his decisions.

And his decisions paint a very different picture of who he is and what he stands for.

Senator METZENBAUM. Thank you very much.

Senator MATHIAS. Senator Simon?

Senator SIMON. Thank you, Mr. Chairman. First, Ms. Feinberg, so I know what we will be working on a year from now, what name are you going to take up next?

Ms. FEINBERG. You can take that up with Ms. Sack.

Ms. SACK. We thought we'd give her a rest.

Ms. FEINBERG. Are you interested in the names?

Senator SIMON. Yes, I am, might as well get a name.

Ms. FEINBERG. This is a tentative list obviously, and we are always adding to it; as quickly as we can find volunteers to research more people, we add more names.

But the current people being looked at include: Robert Bork, William Clark, Frank Easterbrook, Richard Epstein, Thomas Gee, Orrin Hatch of this committee, Cornelia Kennedy, Paul Laxalt, Richard Posner, William French Smith, Ed Meese, Thomas Sowell, Kenneth Starr, J. Clifford Wallace, William Webster, and Ralph Winter. And that's all that I have on this list. And I don't know that in fact we are investigating all of them, but that's the short list that we made up of people that we want to look into at this time.

Senator METZENBAUM. It's enough to give one nightmares.

Ms. FEINBERG. Well, we don't know how many more appointments President Reagan may get a chance to make.

Senator **Simon**. Howard Metzenbaum is not on that list? [Laughter.]

Senator **Metzenbaum**. I'm not available.

Ms. **Feinberg**. Would you like to be added?

Senator **Simon**. You say in your conclusion that he has demonstrated a lack of commitment to civil rights and liberties. And I don't think there can be too much dispute on that.

Then you say he has shown no potential for change on any of these positions.

There are those who dispute the latter, and in questioning him yesterday he pointed out that he had stood up for a Marxist professor, for example; not a popular position.

How would you respond to that observation.

Ms. **Feinberg**. Well, the problem with his dispute is I think you had great difficulty getting him to answer questions about his future decisions or views on issues. So you couldn't find out from him directly whether he thought he might grow or change on certain issues. And what we have to judge him by is his record.

And looking at his record over a long period of time, both his few years as a judge and before that as a professor, he has always held these views. He has been consistent in these views. We have seen little or no change from these positions.

And we can only judge him by the record that we have in front of us. And, based on this record, I see no prospects for major changes in his positions.

Senator **Simon**. I have no further questions. Thank you very much, Mr. Chairman.

Senator **Mathias**. Ms. Feinberg, I have just one question. On the copy of your statement there is a list of the board of trustees.

Ms. **Feinberg**. Yes.

Senator **Mathias**. Is the position that you have enunciated the position of the board of trustees, or is it your individual view?

Ms. **Feinberg**. Well, it is the position of the Nation Institute, and what you should understand is that there is a separate board of the Supreme Court Watch Project of the Nation Institute. And the board of the Supreme Court Watch Project has been consulted about my testimony before I came here today.

Senator **Mathias**. But it is the view of the Institute.

Ms. **Feinberg**. Yes.

Senator **Mathias**. I want to join in congratulating you on an excellent presentation.

Ms. **Feinberg**. Thank you.

Senator **Mathias**. A very fine statement. Thank you very much for being with us. We appreciate it.

Ms. **Feinberg**. Thank you. Further questions?

Senator **Mathias**. No further questions.

[Prepared statement of Kate Michelman follows:]

Testimony
for
National Abortion Rights Action League

On Nomination of Antonin Scalia
to the U.S. Supreme Court

Presented to
Senate Judiciary Committee
by
Kate Michelman
Executive Director

Mr. Chairman, Members of the Senate Judiciary Committee, my name is Kate Michelman and I am here representing the National Abortion Rights Action League, a grassroots political organization with a state and national membership of almost 200,000 women and men. I am NARAL's Executive Director.

The threat to Roe v. Wade[1] imposed by the pending nominations of Antonin Scalia and William Rehnquist is very real. The confirmation of Antonin Scalia and William Rehnquist will, without a doubt, make Roe, and the freedom of women to make private decisions about abortion, more vulnerable than at any time since it was decided in 1973.

If I could speak today to Judge Scalia instead of this committee, I might say to him "Justice, you may be conservative, you may be of a religious faith which opposes abortion, you may prefer to let elected bodies make as many decisions as possible, but Judge Scalia can we count on your fairness? Can we count on you to protect the rights of every citizen of this country, whether they agree with you or not? Can we count on you to recognize the fundamental constitutional rights guaranteed to every individual?"

I cannot speak directly in this way to Judge Scalia, but I can speak to the Senate Judiciary Committee. And so I say to you: Can you trust this man with decisions which will affect the lives and health, the privacy and liberty of millions of American women? Do you believe this nominee has a strong commitment to ensuring that women have equal rights under the law?

As members of the Senate Judiciary Committee you must look at many aspects of a nominee's qualifications and ideology. I am here to point out one important area which you should consider. The women of this nation, and the men who care about them, should be able to count on the members of the U.S. Supreme Court for equal justice under the law.

Without the right to control their reproductive destiny, women are not able to exercise fully their rights to liberty, " to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[2]

Let me repeat that this nominee, and the next nominee to the Supreme Court, will be the deciding votes on whether the _Roe v. Wade_ decision remains as precedent, on the recognition that the right to liberty and privacy includes the right to choose an abortion. This nominee and the next nominee will decide whether women in this country will need to resort to illegal and possibly fatal abortions or will have access to safe legal abortions.

The composition of the Supreme Court is critical to the future of abortion rights. Anti-choice strategists see legislation coupled with litigation as the most likely way to undermine or overturn _Roe_. There is no shortage of anti-choice laws generating litigation.[3]

Further, we must remember that while Chief Justice Burger has had a mixed record on abortion cases, there is every reason to believe that Judge Scalia would take a consistent position against women's liberty to make the choice between abortion and delivery.

We know that in the 13 years since Roe was decided there have been at least 14 abortion cases[4] before the Court. There are enough cases currently moving through the courts to realistically expect the Supreme Court to deal with numerous abortion cases in the immediate future.

Further still, we know the pro-choice majority had narrowed to 5-4 at the time of the most recent decision in Thornburgh v. American College of Obstetricians and Gynecologists.[5] A close look at the members of the Court makes it clear that four of the five pro-choice justices are over the age of 76. The probability is high that we will soon lose one or more of the justices who uphold and protect women's constitutional right to abortion.

We must look at the current nominees keeping in mind that new members of the Court are likely to be appointed in the near future. A Court currently unwilling to follow the leadership of a Rehnquist or form a majority with a Scalia may soon become a Court eager to move away from the recognition of individual rights and return women to the days of illegal back alley abortions.

Scalia, who refuses to recognize women's rights, is a danger when he is in the minority, he is an even greater danger if he becomes a part of a majority trying to move women back into the days of illegal and unsafe abortion.

SCALIA'S MAJORITARIAN VIEWS

In nominating Antonin Scalia, President Reagan has selected a judge who is a) personally and ideologically opposed to abortion rights[6], and who b) believes that the courts should play a very limited role in protecting constitutional rights in cases involving controversial issues.

The intersection of these two views poses a serious threat to the individual liberty of women to make decisions about their lives, as well as to the continued ability of American political and racial minorities, as perennial targets of discrimination, to seek vindication of their constitutional rights in Court.

Scalia's most dangerous view, which he shares with Justice Rehnquist, is his belief that the courts, in analyzing constitutional questions, must abstain from ruling on issues on which there is not a "national consensus."[7]
This is a purely subjective determination. There is no mechanism accurately determining when a national consensus exists. This philosophical approach allows Judge Scalia to decide there was a societal consensus in 1954 at the time of the Brown v. Board of Education decision,[8] but not in 1973 at the time of the Roe decision[9] on the basis of his personal interpretation of history. Once a person with this approach is on the U. S. Supreme Court, we have no further safeguards against his willingness to interpret the law according to his personal views of societal consensus.

Hiding behind claims of judicial restraint, he picks and chooses among rights rather than protecting all fundamental rights as the Supreme Court should.

Perhaps even more frightening is the fact that if Judge Scalia does not like "contemporary consensus" he is willing to refer instead to "traditional consensus."[10]
Scalia's theory of present or past national consensus, or even majority votes by legislative bodies, flies in the face of the

fundamental principles embodied in the Bill of Rights, that the absolute responsibility of the Courts is to uphold the constitutional rights of individuals and minorities, regardless of, and often in spite of, the wishes of the majority.[11]

Roughly defined, the concept of a constitutional right is something than an individual cannot lose to the majority, unless a compelling state interest is invoked. Scalia's majoritarian philosophy though, indicates that the way something becomes a right is that the majority decides it is a right, and that the court should stay away from protecting rights that the majority would not agree with.

Scalia's theory of law based on the morality of the elected majority is reflected in Dronenburg v. Zech, where, in discussing the right to privacy Judge Scalia joined Judge Bork in an opinion which stated:

> When the constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason.[12]

If an individual whose liberty is being violated is not able to turn to the courts, she or he is without much recourse. This raises a difficult barrier for abortion rights: who defines national consensus? A specific judge? Current public opinion? Past traditions? The majority vote of Congress? And what happens in the not unheard of situation where the actions of Congress do not seem to reflect public opinion?

SCALIA'S ABORTION VIEWS

While Judge Scalia has never decided a case dealing specifically with abortion rights, from his public statements he can be expected to vote against women's rights to make private choices.[13]

In discussing abortion at an American Enterprise Institute for Public Policy research forum Scalia stated,

> "We have no quarrel when the right in question is one that the whole society agrees upon," but of rights that could be overidden by the majority, specifically including abortion, Scalia added, "the courts have no business being there. That is one of the problems; they are calling rights things which we do not all agree on."[14]

Because for some abortion is a morally complex issue, Scalia would defer to the various judgements of the 50 state legislatures, the hundreds of local legislatiave bodies--where decision making is often based on what is politically expedient today rather than on a reasoned application of constitutional principles and precedents. He would defer to political bodies rather than affirm constitutional rights that allow individual women to weigh for themselves their life circumstances and the moral questions and make a personal decision.

As a Supreme Court Justice, Antonin Scalia, in all likelihood, would rule that the liberty to make a personal private decision about abortion is not a fundamental right protected from quirky interference by temporary legislative majorities. This will have a tremendous impact on the lives of the women of this country, as letters from women who have had abortions demonstrate:

> Becoming pregnant just two months after the birth of her first child, [my mother] was not well recovered from this experience. Her doctor was concerned for her health, but in 1940 there were no options. She and my father chose to abort this child, fearful her health was too fragile to manage another pregnancy so soon. Done by a backstreet butcher, the abortion put my mother's life in jeopardy and led to complications which nearly killed her during her pregnancy with me a few months later. She and I were in the hospital for 21 days following my birth and her health was permanently ruined. She underwent a hysterectomy by the age of 30 and has had two spinal fusions to attempt to repair the damage done to her body because of her pregnancies. (L-5)

> I think the thing I will always remember most vividly was walking up three flights of darkened stairs and down that pitchy corridor and knocking at the door at the end of it, not knowing what lie behind it, not knowing whether I would ever walk back down those stairs again. More than the incredible filth of the

place, and my fear on seeing it that I would surely become infected; more than the fact that the man was an alcoholic, that he was drinking throughout the procedure, a whiskey glass in one hand, a sharp instrument in the other; more than the indescribable pain, the most intense pain I have ever been subject to; more than the humiliation of being told, "You can take your pants down now, but you shoulda'--ha!ha!--kept 'em on before;" more than the degradation of being asked to perform a deviate sex act after he had aborted me (he offered me 20 of my 1000 bucks back for a "quick blow job"); more than the hemorrhaging and the peritonitis and the hospitalization that followed; more even that the gut-twisting fear of being "found out" and locked away for perhaps 20 years; more than all of these things, those pitchy stairs and that dank, dark hallway and the door at the end of it stay with me and chills my blood still.

Because I saw in that darkness the clear and distinct possibility that at the age of 23 I might very well be taking the last walk of my life; that I might never again see my two children, or my husband, or anything else of this world. (L-2)

This is not a letter about an abortion. I wish it were. Instead, it is about an incident which took place over forty years ago in a small mid-western town on the bank of the original "Old Mill Stream". One night a young girl jumped off the railroad bridge to be drowned in that river. I will always remember the town coming alive with gossip over the fact that she was pregnant and unmarried. . . I could imagine the young girl's despair as she made her decision to end her life rather than face the stigma of giving illegitimate birth. . .I still grieve for the girl. (L-6)

My job on the assembly line at the plant was going well and I needed that job desperately to support the kids. Also I had started night school to improve my chances to get a better job. I just couldn't have another baby--5 kids were enough for me to support.

I felt badly for a day or two after the abortion. I didn't like the idea of having to go thru with it. But it was the right thing for me to do. If I had had the baby I would have had to quit my job and go on welfare. Instead I was able to make ends meet and get the kids thru school. (L-19)

To this day I am profoundly grateful for having been able to have a safe abortion. To this day I am not a mother, which has been my choice. I have been safe and lucky in not becoming pregnant again. I love people and work in a helping profession which gives me much satisfaction. (L-21)

I am a junior in college and am putting myself through because my father has been unemployed and my mother barely makes enough to support the rest of the family. I have promised to help put my brother through when I graduate next year and its his turn. I was using a diaphragm for birth control but I got pregnant

> anyhow. There is no way I could continue this pregnancy because of my responsibilities to my family. I never wanted to be pregnant and if abortion were not legal I would do one on myself. (L-22)
>
> I had an abortion in 1949 because I could not go through with a loveless marriage for the sake of a child I did not want. . . The benefits were incalculable. I was able to terminate the pregnancy, to complete my education, start a professional career, and three years later marry a man I did love. We subsequently had three beautiful children by choice, children who were welcomed with joy, cherished always, and raised with deep pleasure because we attained economic security and the maturity necessary to provide properly for them. (L-29)

SCALIA'S VIEWS ON WOMEN'S RIGHTS

There are cases in which Scalia has shown himself hostile to the rights of women and minorities. For example, in Vinson v. Taylor, in which the Supreme Court upheld the D.C. Court of Appeals' decision that sexual harassment constitutes discrimination in violation of Title VII, Scalia joined Judge Bork at the appellate level in a dissenting opinion which uses language which insults and degrades women. The dissent characterizes a supervisor's sexual harassment of an employee as mere sexual "dalliance" and "solicitation" of sexual favors; the plaintiff's problems are ignored or trivialized while Scalia and Bork play intellectual games with the combinations and permutations resulting from mixing and matching hetero-, homo- and bisexual supervisors and employees. Scalia's concurrence in this decision indicates a great insensitivity to the real and serious problems of sex discrimination in our society.

Scalia's dissent in Carter v. Duncan-Huggins, Ltd., in which the D.C. Court of Appeals upheld a lower court finding that a black employee had been intentionally discriminated against by her employer, reflects a similar insensitivity to the problems of race discrimination. Scalia would have disregarded the clear evidence of intentional discrimination and formulated a principle that would have effectively prevented employees in small businesses from ever proving discrimination.

It is disturbing to think that a man with the insensitivity reflected in these cases will in the future make U.S. Supreme Court decisions affecting women's lives.

CONCLUSION

The National Abortion Rights Action League urges you to vote against Antonin Scalia's confirmation as a Justice of the United States Supreme Court, in order to preserve the fundamental constitutional right of American women to make an individual decision about whether or not to choose an abortion--a decision which can affect almost every other aspect of her life.

FOOTNOTES

[1] 410 U.S. 113 (1973)

[2] Meyer v. Nebraska, 262 U.S. 390, 399 (1923)

[3] See document The Threat to Roe: A Legal Analysis by Harmon and Weiss (submitted with testimony by NARAL Board Chair at hearing of Senate Judiciary Committee on William Rehnquist nomination to Chief Justice, July 1986) for examples of cases pending. Much of this testimony draws on the Harmon & Weiss analysis.

[4] Doe v. Bolton 410 U.S. 179
Planned Parenthood of Missouri v. Danforth 428 U.S. 52
Singleton v. Wulff 428 U.S. 106
Guste v. Jackson 429 U.S. 399
Maher v. Roe 432 U.S. 464
Poelker v. Doe 432 U.S. 519
Colautti v. Franklin 439 U.S. 379
Harris v. McRae 448 U.S. 297
Williams v. Zbarz 448 U.S. 358
H.L. etc. v. Matheson 450 U.S. 398
Planned Parenthood Association v. Ashcroft 462 U.S. 476
Akron v. Akron Center for Reproductive Rights
462 U.S. 416
Diamond v. Charles 54 U.S.L.W. 4418 (1986)
Thornburgh v. ACOG 54 U.S.L.W. 4618 (1986)

[5] supra

[6] Congressional Quarterly June 21, 1986 page 1401

[7] An Imperial Judiciary: Fact or Myth? an edited transcript of an American Enterprise Institute Public Policy Forum held on December 12, 1978 page 21

[8] id. at 36-37

[9] id. at 21

[10] "Mr. Scalia: But I am not talking about just the contemporary consensus. I am not saying the Court always has to go along with the consensus of the day. The Court may find that the traditional consensus of the society is against the current consensus. If that is the case, then the Court overrides the present beliefs of society on the basis of its historical beliefs. I can understand that." id. at 36.

[11] Justice Stevens, concurring in Thornburgh, supra at 4627, reminds us that this is not a new idea. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

[12] Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984)

[13] id. at 7, 21, 35

[14] id. at 21

May 15, 1985

Dear President Reagan,

Since you seem to feel that women's rights to control their lives should be curtailed, I encourage you to listen to my story.

My mother had an illegal abortion between the birth of my sister and myself (we were only 18 months apart). She had a congenital spinal defect and pregnancies were very hard on her. Becoming pregnant just two months after the birth of her first child, she was not well recovered from this experience. Her doctor was concerned for her health, but in 1940 there were no options. She and my father chose to abort this child, fearful that her health was too fragile to manage another pregnancy so soon. Done by a backstreet butcher, the abortion put my mother's life in jeopardy and led to complications which nearly killed her during her pregnancy with me a few months later. She and I were inthe hospital for 21 days following my birth and her health was permanently ruined. She underwent a hysterectomy by age 30 and has had two spinal fusions to attempt to repair the damage done to her body because of her pregnancies.

I was more fortunate than she but also have a difficult story to tell. I had problem pregnancies culminating with the birth of my daughter by emergency caesarean section September 2, 1970. While nursing her, I decided to use a Dalken Shield to prevent further pregnancies (I had a son and a daughter and did not feel physically capable of going through another pregnancy having miscarried three times and having given birth to twins who died at birth all in the five year span between my children). Unknown to me, the Shield worked its way through the caesarean scar and lodged on the top of the uterus. I had been using contraceptive creams to prevent pregnancies before resorting to the IUD but kept having urinary tract infections because of them. So my urologist hospitalized me and performed a cystoscopic exploration which included 16 X rays of my kidneys, bladder, ureters, and urethra. To my obstetrician's and my horror, I was then two weeks pregnant due to the failure of the IUD. He did not know where it was, but he did not feel that I was physically capable of another pregnancy at that time (9 months after my caesarean).

Furthermore, he felt certain that the fetus would be seriously deformed as a result of the X ray exposure. So while neither he, my husband, nor I wanted this child, I could not easily get an abortion. My doctor sent me to a psychiatrist who had to coach me how to fail a psychiatric exam to prove that I was not capable of enduring another pregnancy at that time. I failed my exam and the abortion was approved (by whomever decided such matters of life and death in Arizona in 1971).

The abortion was performed but the IUD did not come out. I had to have major surgery three months later (when my obstetrician felt I was healthy enough to undergo yet another such procedure - three in one year). When he found the notorious Dalken Shield enbedded in the caesarean scar within the abdomen, he was certain that he had done the correct thing: the caesarean scar could not have held for the duration of the pregnancy - both the child and I would have died leaving two very young children without a mother for the rest of their lives.

Fortunately, I had good care and my health was not ruined as my mothers had been. I have thoroughly enjoyed both my children and feel very fortunate to have been entrusted with two lovely, healthy, vital young lives to raise. And I feel they were fortunate to have been able to have me for their mother. I have since divorced their father who became an alcoholic and have successfully single parented them. My son is a sophomore at ASU majoring in accounting; my daughter graduated as the outstanding female student of her large junior high - based on academic, musical and extra curricular activities. I have earned two masters degrees and a PhD since that time and am a psychologist at . I feel that I have had an important impact on many lives. Had I not died, had I been forced to raise a seriously impaired child, all of us would have suffered incredibly. Statistics for families with seriously deformed children are pathetic. Everyone's life is irreparably dimished.

And you want to take this right away from us. How dare you play God with my life, my children's lives, or our futures. We have the right to have determination over the quality of our lives. Don't force us back into the hell holes of the illegal abortionists. Let us make our choices based on our own reasonings: no one else should have control over decisions that impact the very existence of women and their children but the women themselves. So my unborn child had rights? To destroy the rest of us? I disagree. And we all know that unwanted children are abused, neglected children. Let us bring healthy young lives into this already crowded world - born of parents who want them, who will cherish them, nurture and provide for them. Don't set us back to the dark alleys of the dark ages.

Emphatically,

Connie

Connie

April 17, 1985

Dear President Reagan:

You recently celebrated your 74th birthday. Congratulations. Some three decades past, I recall wondering if I would be around for my 24th. I very nearly wasn't, and I'd like to tell you a little about that.

Let me begin by saying that I have been married 33 years; I am the mother of 5 wanted and thoroughly loved children; the grandmother of 3; and the victim of a rapist and an illegal abortionist.

In the mid-1950's I was very brutally raped, and this act resulted in pregnancy. At first suspicion that this might be the case, I went immediately to my doctor, told him what had happened and pleaded for help. But of course He couldn't give it. To have performed an abortion would have meant chancing up to 20 years in pris~~f~~on both for him and for me.

Turned away by this reputable physician, I went to another, considerably less reputable. This second doctor's sense of ethics left much to be desired--his practice consisted primarily of pushing amphetamines; but even he felt that performing an abortion, no matter what the reason, was just too risky an undertaking.

Knowing nowhere else to turn, and completely terrified by all I had heard about the local abortionist, I went home and proceeded to try all the sundry 'home remedy' things I had heard of--things like deliberately throwing myself down a flight of stairs, scalding the lower half of my anatomy in hot tubs, pounding on my abdomen with a meat mallet, even drinking a full pint of castor oil, which I assure you is no enviable feat.

The single notable effect of all these efforts and more was that I became very black and blue and about a month more pregnant than I had been when I started. And so, as a final desperate measure, I took the only option left. I went to see the local back-alley abortionist--the man who had no cause to fear the police because he was paying them off.

I think the thing I will always remember most vividly, Mr. Reagan, was walking up those three flights of darkened stairs and down that pitchy corridor and knocking at the door at the end of it, not knowing what lie behind it, not knowing whether I would ever walk back down those stairs again. More than the incredible filth of the place, and my fear on seeing it that I would surely become infected; more than the fact that the man was an alcoholic, that he was drinking throughout the procedure, a whiskey glass in one hand, a sharp instrument in the other; more than the indescribable pain, the most intense pain I have ever been subject to; more than the humiliation of being told, "You can take your pants down now, but you shoulda'--ha!ha!--kept 'em on before"; more than the degradation of being asked to perform a deviate sex act after he had aborted me (he offered me 20 of my 1000 bucks back for a "quick blow job"); more than the hemorrhaging and the peritonitus and the hospitalization that followed; more even than the gut-twisting fear of being 'found out' and locked away for perhaps 20 years; more than all of these things, those pitchy stairs and that dank, dark hallway and the door at the end of it stay with me and chill my blood still.

Because I saw in that darkness the clear and distinct possibility that at the age of 23 I might very well be taking the last walk of my life; that I might never again see my two children, or my husband, or anything else of this world.

And still, knowing this, knowing that my 24th birthday might never be, I had no choice. I *had* to walk through that door, because not to have would have meant giving birth to the offspring of a literal fiend; and for me, the terror of that fate was worse than death.

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Thirty years later, I still have nightmares about those dark stairs and that dark hall and what *was* on the other side of that door. And I resent them. I resent more than any words can say what I had to endure to terminate an unbearable pregnancy. But I resent even more the idea that ANY WOMAN should, for ANY REASON, ever again be forced to endure the same. — — — — — — — — —

My experience, sad to say, is far from unique. I could speak to you days on end of like experiences. Women white, women black, women young, women old, women known to the medical books only by their initials and their perforated or Lysol-damaged wombs and their resultant infections and suffering and, all too frequently, eventual deaths.

Women really too young to be called women, victims of the dirty knife, undergoing hysterectomies at 16. Women with bottles of household disinfectants, sometimes even lye, who had no use for a hysterectomy, nothing left to perform one on. Desperate, hopeless women with bent heads and unbent coathangers, screaming in the night, dead at 23. Women for whom the phrase "right to life" was without meaning or substance. Women murdered, as surely as putting a gun to their heads, by a blue-nosed and hypocritical society that lauded What Might Be and condemned What Was.

The man who raped me left me for dead. And I very nearly was. The man who aborted me could not have cared less if I had died. And again, I very nearly did. But a miss *is* as good as a mile. And I *did* make my 24th birthday. And despite all the horror, physical, psychological and financial, I consider myself very lucky. *I* am still able to Speak Out. The real tragedy of those pre-1973 days of State and Church controlled wombs is: those countless women who can only speak to you from the grave.

In their memory, I want to tell you and the world today that to speak of a 'right to life' and deny simultaneously the right to LIVE that life, fully and in accord with ones own rational dictates, is the most odious of paradoxes. It is an hypocrisy that ranks right up there with establishing a 'right to sexual freedom' for all eunuchs.

And finally, it is an insult to anyone worthy of the title 'Homo sapiens'.

Sincerely,
Sherry Matulis
Sherry Matulis

Peoria, IL 61603

April 15, 1985

Dear TARAL:

This is not a letter about an abortion. I wish it were. Instead, it is about an incident which took place over forty years ago in a small mid-western town on the banks of the original "Old Mill Stream."

One night a young girl jumped off the railroad bridge to be drowned in that river. I will always remember the town coming alive with gossip over the fact that she was pregnant and unmarried.

I was enormously moved by what to me was a terrible tragedy. I could imagine the young girl's despair as she made her decision to end her life rather than face the stigma of giving illegitimate birth. You must remember this was a mid-western town where "traditional values"--to use a current phrase--were the only acceptable standards.

I was young and did not even know the term "abortion" at the time. Perhaps the young girl didn't either. Even if she had, there would have been no place in that small town where she could have obtained one.

I still grieve for the girl. She should not have had to pay with her life for that one mistake.

And we must not now condemn other women to the same fate. If we allow the current efforts of the anti-abortionists to succeed, and return us to the "old values," that is exactly what will happen in many cases. If a girl who finds herself pregnant does know about abortion, she may lose her life under the knife of an illegal abortionist. If she does not, she may so despair of her wrecked life that she will find a way to suicide. Either way, it is a terrible waste of a precious life--the woman's.

Jan Brazill
Jan Brazill

El Paso, Texas 79936

Date April 28, 1985

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Dear President Reagan,

I am a 45 year old woman who had an abortion in 1972. Except for my mother I have never told anyone about this. Of course, I was raised a Catholic and although I started using birth control after my 5th child because 5 kids are enough for anyone, I never expected to have to make a decision about abortion.

My husband had always been a heavy drinker, but when he began pushing me around after drinking I knew I could not keep on living with him. I had been able to go to work when the youngest boy started kindergarten, and although it would be hard to support the kids by myself it would be better than living with the abuse and fighting.

After we separated I stopped taking the pill because I had no intention of having sex with anyone. About four months later he came pounding on the door. I didn't want the kids awakened or the neighbors to hear so I let him in. Before he would leave he forced himself on me and I became pregnant.

My job on the assembly line at the plant was going well and I needed that job desperately to support the kids. Also I had started night school to improve my chances to get a better job. I just couldn't have another baby — 5 kids were enough for me to support.

I felt badly for a day or two after the abortion. I didn't like the idea of having to go thru with it. But it was the right thing for me to do. If I had had the baby I would have had to quit my job and go on welfare. Instead I was able to make ends meet and get the kids thru school.

I think it is terrible that women are made to feel guilty about abortion. I feel proud of myself for what I've accomplished.

Name

Juanita

Address

600 35

ZIP CODE

Oakland, Ca.
Apr 22, 1985

Senator Pete Wilson
c/o CARAL
4110 Geary Blvd.
San Francisco

Dear Senator Wilson:

In response to NARAL's suggestion that we, who have safely undergone legal abortions (and those who have undergone unsafe, illegal abortions) let our feelings be known about our experience, I am writing this letter.

When I was 24 yrs old, I had a legal abortion. A contraceptive method failed, and I knew I was not ready to raise a family. I worked in the day; went to school at night. My husband was in graduate school—our marriage was unstable and we later divorced.

To this day I am profoundly grateful for having been able to have a safe abortion. To this day I am not a mother, which ~~is~~ has been my choice. I have been safe and lucky in not becoming pregnant again. I love people and work in a helping profession which gives me much satisfaction.

Please help preserve our freedom of choice.

Sincerely,

Susan

I am a junior in college and am putting myself through because my father has been unemployed and my mother barely makes enough to support the rest of the family. I have promised to help put my brother through when I graduate next year and it's his turn. I was using a diaphragm for birth control but I got pregnant anyhow. There is no way I could continue this pregnancy because of my responsibilities to my family. I never wanted to be pregnant and if abortion were not legal I would do one on myself. I believe women need to have the right to choose for themselves. No one can make another's decision because no one knows your own life circumstances.

Pam
15360

May 16, 1985

Dear Members of Congress and Mr. Reagan:

I am breaking a 34 year silence about my abortion because it is essential for you to know what it is like to have lived this experience. I believe you need to open yourself to what it is really like for women. Since it is physically impossible for male government officials and elected representatives to be unwillingly pregnant, it behooves you to listen and learn with enough humility to avoid the incredible arrogance with which this issue is so often approached. I hope you will learn to view women's lives and reproductive choices with enough respect to insure that they will never again be subject to unconstitutional restrictions.

I had an abortion in 1949 because I could not go through with a loveless marriage for the sake of a child I did not want. I can still remember with horror, the feelings of helplessness, despair, shame, guilt, desperation and anger that engulfed me. I was luckier than most women in 1949, however. I was able to terminate the pregnancy. The benefits to me were incalculable. I was able to complete my education, start a professional career, and, three years later, marry a man I did love. We subsequently had three beautiful children by choice, children who were welcomed with joy, cherished always, and raised with deep pleasure because we had attained economic security and the maturity necessary to provide properly for them.

I was and shall always be profoundly grateful that the choice to have a safe abortion was presented to me. I am certain that it saved me from disastrous life-long consequences ensuing from divorce and the grinding poverty of single parenthood. I have NEVER, EVER, even for one moment regretted my decision to end the pregnancy. What I do regret is the fact that I had to do it illegally and in secrecy. Because I could not choose abortion freely and in privacy as is now guaranteed by the constitution, I have struggled with 36 years of suppressed anger, guilt and shame—certainly not over the decision to abort, but over the punitive and diminishing effect of the puritannical sexual double standard which held abortion to be immoral. The fact that only women were subjected to vilifaction and contempt while the men's part in the issue was completely ignored, and still is for the most part, is a continuing source of outrage to me.

Women will never willingly return to the horrors and injustices of illegal abortions again. We will be silent no more—those of us who can afford the painful price. Your mothers, wives, daughters, friends and relatives, millions of us are among the silent who cannot come forward with their truth. Those of us who can, carry their burden and insist that abortion must remain legal, safe and accessible to avoid another millenium of agony and peril.

Sincerely,
Jane Roe
Jane Roe
Tucson, AZ 85718

Senator **Mathias**. Our next panel will be composed of Dr. Robert L. Maddox, executive director of Americans United for the Separation of Church and State; and Mr. Peter Weiss of the Center for Constitutional Rights. Ms. Dudley is not here.

Gentlemen, if you will raise your right hand. Do you swear that the testimony you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

Dr. **Maddox**. I do.

Mr. **Weiss**. I do.

Senator **Mathias**. Dr. Maddox, do you want to start? I remind you of the 3-minute rule and also of the fact that your full statement will be included in the record.

TESTIMONY OF ROBERT L. MADDOX, EXECUTIVE DIRECTOR, AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE, AND PETER WEISS, VICE PRESIDENT, CENTER FOR CONSTITUTIONAL RIGHTS

Dr. **Maddox**. Thank you. I am Robert Maddox, executive director of Americans United for Separation of Church and State. We are a 39-year-old national organization dedicated to the preservation of religious liberty and the separation of church and state.

We represent within our membership some 50,000 people, a broad spectrum of religious and political viewpoints, but we are all united in the conviction that separation of church and state is essential.

We of Americans United believe that religious liberty is the preeminent liberty of the American Republic, the benchmark of all other civil liberties.

We believe in the inherent strength of the American religious community to manage its own affairs, to make its own mark, and to impart a sense of values to the Nation.

This rich and diverse community does not need propping up by the Government and should at all costs remain free from Government entanglement.

Therefore we respectfully suggest that the Senate consider carefully the appointment of an individual to the Supreme Court who seems hostile to the time-honored principle of the separation of church and state. Judge Scalia, in testimony before the U.S. Congress, and in other ways, has criticized the direction this Court has taken in its decisions on religious liberty.

In 1978 he testified on behalf of a bill to give tuition tax credits to patrons of private and parochial schools. He supported the bill; Americans United opposed the bill. At that session, in our opinion, Mr. Scalia demonstrated a disregard for the establishment clause of the first amendment. He told the Senate not to worry about the question of whether tuition tax credits were constitutional, but to decide on the basis of what the fundamental traditions of the society require—those words coming from a man who has been characterized as a strict constructionist.

He argued that the denial of tuition tax credits to parents of students at religious schools was an antireligious result that the Framers of the Constitution had not intended.

Fortunately, the Congress rejected this unwise advice and defeated the tuition tax credit bill later that year.

Mr. Scalia has also characterized the Court as being terribly confused about this and other matters of religious liberty.

Mr. Scalia has also questioned the High Court's policy of granting broad standing to taxpayers who want to file lawsuits in first amendment cases, thus shutting the door of the Court to many who would bring up first amendment establishment of religion cases.

Throughout his career Mr. Scalia has demonstrated an insensitivity to matters of the first amendment.

We think also that the Senate should take stock of the direction in which the Reagan administration seems to be taking the Supreme Court. We fear that a Rehnquist-Scalia axis in the Court would further subvert individuals to the power of the State. We Americans thought that many of these issues of personal liberty were settled, but apparently they are not. A spirit of confusion prevails in this country.

We make the assumption that Judge Scalia reflects the views of President Reagan on church and state, views we find inimical.

On the basis of Judge Scalia's record and in vigorous protest of the attitudes of the Reagan administration who appointed him, we oppose the nomination. We ask you to reject the nomination of Judge Scalia to the U.S. Supreme Court.

[Prepared statement follows:]

TESTIMONY OF

DR. ROBERT L. MADDOX
Executive Director

AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE

Mr. Chairman and Members of the Committee,

I am Robert L. Maddox, executive director of Americans United for Separation of Church and State, a 39-year old national organization dedicated exclusively to the preservation of religious liberty and the separation of church and state. We represent within our membership of 50,000 a broad spectrum of religious and political viewpoints. But we are all united in the conviction that separation of church and state is essential. As Justice Wiley Rutledge observed in his 1947 Everson opinion: "We have staked the very existence of our country on the faith that a complete separation between the state and religion is best for the state and best for religion."

We at Americans United believe that religious liberty is the preeminent liberty of the American republic, the benchmark of all other civil liberties. We believe that the constitutional guarantee of religious liberty through the separation of church and state is the single most important contribution this country has made to Western civilization during the past two centuries. We believe in the inherent strength of the American religious community to manage its own affairs, make its own mark, and impart a sense of values to the nation. This rich and diverse community does not need propping up by the government and should, at all costs, remain free from government entanglement.

Therefore, respectfully, we believe the Senate should carefully consider the appointment of an individual who seems hostile to the time-honored principle of the separation of church and state. Judge Scalia has criticized the direction this Court has taken in its decisions on religious liberty.

In 1978 Mr. Scalia and Americans United testified at the same set of hearings before the Senate Finance Committee on a bill to give tuition tax credits to patrons of private and parochial schools. Mr. Scalia supported that bill. Americans United opposed that bill.

At that session, in our opinion, Mr. Scalia demonstrated a disregard for the Establishment Clause of the First Amendment. Mr. Scalia, who has been characterized as a strict constructionist, told the Senate not to worry about the question of whether tuition tax credits were constitutional, but to decide on the basis of what "the fundamental traditions of the society require." He argued that the denial of tuition tax credits to parents of students at religious schools was an "anti-religious result" that the Framers of the Constitution had not intended.

Fortunately, the Congress rejected that unwise advice when it defeated the tuition tax credit bill later that year.

In his testimony at that hearing, Mr. Scalia cited what he called the "utter confusion" of Supreme Court rulings on church-state separation. Mr. Scalia's characterization of the past forty years of Supreme Court rulings deeply disturbs us. The Court's decisions do not represent confusion, particularly in the area of public assistance for church-related schools. Beginning in 1971 the Supreme Court rejected scheme after scheme which state legislatures had devised to circumvent the Constitution and provide substantial public subsidies for church schools. Indeed the landmark Lemon case has established guidelines to test the constitutionality of any legislation which might run afoul of the Establishment Clause. Those guidelines represent a major achievement of the Burger Court. We wonder if Mr. Scalia would dismantle them. We worry about the consequences to religious freedom both for the taxpayer who does not wish to be taxed involuntarily for religion and for the church schools themselves which need to be protected from government intervention and meddling.

Mr. Scalia also questioned the High Court's policy of granting broad standing to taxpayers to file lawsuits in First Amendment church-state cases. "That has enabled cases to reach the Court which couldn't have gotten there before," he added. Taxpaying citizens of the United States should have a right to seek redress under the law when they believe their religious liberties are being infringed. It would be a terrible retrenchment if we were to restrict the freedom of citizens to challenge governmental action in the sensitive area of religion.

Finally, Mr. Chairman, let us take stock of the direction in which the Reagan Administration seems to be taking the Supreme Court. Those of us who labor for religious freedom day in and day out experience grave anxiety by the apparent attempt of the President to reshape the entire direction of our Supreme Court. We see individual liberties suffering. We see citizen's rights sacrificed by and to the state. We fear that a Rehnquist/Scalia axis in the Court could further subvert individuals to the power of the state. Americans thought many of the issues of personal liberty were settled. We thought that religious freedom was safe from the buffeting winds of change. We thought there was a consensus in this country that religion was too sacred and precious an area for government to meddle in or for government to support and thereby attempt to control.

Now a spirit of uncertainty prevails in this country. We no longer know whether the Supreme Court will remain a bastion of liberty and a bulwark of justice.

We make the assumption that Judge Scalia reflects the views of President Reagan on church and state, views we find inimical. On the basis of Judge Scalia's record and in vigorous protest to the attitudes of the Reagan Administration who appointed him, we oppose the nomination.

We ask you to reject the nomination of Judge Scalia to the United States Supreme Court.

(Statement of Frank Brown, professor of economics, DePaul University, and Chairman, National Association for Personal Rights in Education(NAPRE), speaking on behalf of NAPRE, to the U.S. Senate Judiciary Committee at the hearings on the nomination of Judge Antonin Scalia to the U.S.Supreme Court, Senate Office Building, Washington, D.C. Aug. 6, 1986).

PERSONAL RIGHTS AT THE U.S.SUPREME COURT

I am Frank Brown, an economics professor at DePaul University, and, in speaking here as Chairman of the National Association for Personal Rights in Education(NAPRE) wish first to thank the Senate Judiciary Committee for the opportunity to present our position on and our rationale for the nomination of Judge Antonin Scalia to the U.S.Supreme Court.

NAPRE is a group of parents dedicated to the personal civil and constitutional rights of families, parents, and students to academic freedom and religious liberty in education. We hold that if families are taxed by government for schooling then they should have a right to an equitable share of the taxes, especially their own, to enroll their children in schools of their choice, including those with church-related base.

This is a civil right and civil liberty honored in all other democracies of the West, but in America it is among the most abused of personal rights. For taxpaying parents are told that they can either accept what a state system considers to be public elementary and secondary schooling or else forfeit their education taxes and seek out private resources to fulfill the public obligation to school their children, a task well-nigh impossible for many parents, especially the low-income. NAPRE points out that many families, including its own, have been hurt by this system.

This state system is not a product of the Founding Fathers. Its prototype was the Massachusetts system developed in the mid-19th century by Horace Mann, an educational statist indifferent to parental choice. Since then state school systems have grown, especially in the earlier days through the political support of leading religious sects, many of whose parents are now questioning the wisdom of their alliance with the state in the matter of schooling.

To heal old wounds and to meet new needs many state legislatures have in recent decades enacted many laws to extend the benefits of the education taxes to all children, including those in church-related and other private schools, but unfortunately the U.S.Supreme Court has blocked almost all these efforts.

The prime source of the Court's argument is the interpretation by Justice Hugo Black (Everson, 1947) of the Establishment Clause of the First Amendment, in which he relied almost exclusively on the successful struggle of Madison and Jefferson in Virginia to outlaw any one church or religion being given preferential tax status.

But, going beyond the condemnation of a government according special privilege to one church or religion, Black concluded that the First Amendment also meant that neither a state nor the Federal government could pass laws which "aid all religions", but there is no historical proof, no constitutional justification, no precedent, no stare decisis for this conclusion.

Black did not research this matter well. He did not refer to the Annals of Congress, which portrays quite adequately the congressional debates out of which the First Amendment evolved. Nor did he refer to Elliott's Debates, which in reporting the debates on the ratification of the constitution in the various states furnishes abundant proof that the people of the time widely considered establishment of religion to be government support of one preferred church or religion.

But, despite its errors or perhaps because of them, the Black doctrine, relying on his substitution of his newly-forged constitutional weapon of "absolute separation of church and and state" for the language of the Constitution, is the foundation for the theory of the separation of the state and religion and for the denial of education tax equity to children in church-related schools.

In thus placing the personal education rights of parents and students under a church-state umbrella, Black and his allies have practically nullified the guarantees of these rights by the Establishment and Free Exercise clauses of the First Amendment, the liberty and property provisions of the Fifth Amendment, and the liberty and property and equal protection of the laws provisions of the Fourteenth Amendment, but these rights have their own constitutional standing and are in no way contingent on the constitutional status---or lack of status---of any church or religion.

We do not fear the Constitution. We respect it. But we fear and do not respect justices who have gotten out of hand.

Fortunately the Black doctrine has not been able to obtain full acceptance on the Court, with almost all its decisions on this matter drawing persistent dissent from fellow-justices.

Thus then-Chief Justice Burger(Meek v. Pittenger, 1975) said in dissent:"One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion----at least while this Court sits."

As citizens and parents we respectfully recommend to your Judiciary Committee a favorable vote on Judge Antonin Scalia.

We recommend him because he is a scholar. We have been severely hurt in recent decades by lack of scholarship on the Court and we welcome him.

We recommend him because he respects the Constitution. Some justices consider the constitution as anachronistic and as little more than a set of noble pronouncements, but we believe that there is great wisdom in this document, certainly in the area of our discussion here today, the personal rights of parents and children.

We recommend him because he believes in the rule of law over that of men. As victims at the Court of the opposite, namely, the rule of men over that of law, we endorse Antonin Scalia's insight into this cornerstone of American jurisprudence. We also note that a Court that can abuse the rights of some citizens can abuse those of others and indeed of all as well.

We recommend him because we believe that he will be a judge and not a legislator. We have suffered too much from a U.S.Supreme Court which has legislated itself into a National School Board, which has placed the educational statism of Horace Mann under the protection of the First Amendment, and which has long been blocking the public policy attempts of many legislatures to provide for the extension of educational benefits to all children.

Finally,we recommend Antonin Scalia to your committee, because we believe that the rights and liberties in education of parents and children will be safe in his judgment.

NAPRE,
Box 1806,
Chicago, Ill. 60690

Frank Brown,
Chairman, NAPRE.

Frank Brown

1-312-333-2019.

Senator MATHIAS. Thank you, Dr. Maddox. Mr. Weiss.

STATEMENT OF PETER WEISS

Mr. WEISS. Mr. Chairman, I am here representing the Center for Constitutional Rights if I may start on a personal note, my grandfather and several other members of my family died in Nazi gas chambers. That has left me with a lifelong passion for human rights and for using the law to resist or seek redress for the commission of atrocities by governments of whatever political stripe.

I am here today because of my conviction that Judge Scalia does not share that passion and that this raises serious questions about his qualifications to sit on the Supreme Court of the United States.

I base that on one case, a rather unusual one that has not been touched on by the other witnesses so far. It was called *Sanchez-Espinoza* v. *Reagan*. We brought that case in 1982 in the District Court for the District of Columbia on behalf of nine Nicaraguan victims of Contra atrocities, people who had been subjected—or their relatives had been subjected—to murder, kidnapping, rape, torture, and other gross human rights violations. The defendants included the President of the United States and the Secretaries of State and Defense, the Director of the CIA, and various other high U.S. officials.

The case was dismissed in the District on the political question doctrine, and when it came before the Circuit Judge Scalia was his usual courteous self and was very interested in the case, and indicated that he would not decide it on that basis. He then proceeded, some 15 months later—maybe that was the time it took him to forge a consensus—to decide it on variety of grounds in which he dealt with every single cause of action that had been alleged.

The net result was a total rejection of these claims, and he rejected them even though he had to accept the facts as true, because this was a motion to dismiss. And he rejected them even though he conceded that the courts, in their discretion, could have granted some relief.

But he said it would have been an abuse of the court's discretion to grant that relief. He also said that sovereign immunity protected the U.S. officials even though, in another case, which we had had in the second circuit, sovereign immunity was held not to protect the officials of a foreign government from a suit for torture.

A strange message, it seems to me, to send to the world.

He also said that the fourth and fifth amendments did not protect these plaintiffs because of the danger of foreign citizens using the courts of the United States to challenge American foreign policy.

Now, in its starkest terms, the message of that decision is this: Nuremberg never happened; no matter what atrocities are committed abroad in the name of or under the direction of officials of the United States, foreigners need not apply for redress.

We are now in a time when terrorism and counterterrorism have become preferred instruments of foreign policy, and it would be nice to have someone on the Supreme Court who had the courage to protect the victims of that terrorism and of that counterterrorism.

I am afraid that Judge Scalia is not that person, because, although he said yesterday that he believes that checks and balances are the fundamental structure of the U.S. Government because they will prevent any one branch from abusing the liberties of the people, even though he may believe that in principle, what he decided in this case, Mr. Chairman, shows that he would not be prepared to enforce that principle as a member of the Supreme Court.

I thank you for your attention.

[Prepared statement follows:]

Testimony of Peter Weiss, Vice President, Center for Constitutional Rights, on the Nomination of Judge Antonin Scalia to the Supreme Court of the United States

My name is Peter Weiss. I am a senior partner in the New York law firm of Weiss, Dawid, Fross, Zelnick and Lehrman, which counsels a number of major corporations in the field of industrial property. I am also a Vice President and volunteer attorney of the Center for Constitutional Rights and I appear before you today in that capacity.

The fact that my grandfather and several other members of my family died in Nazi gas chambers has left me with a lifelong passion for human rights and for using the law to resist or seek redress for the commission of atrocities, or crimes against humanity, by governments of whatever political stripe. I am here today because of my conviction that Judge Scalia does not share that passion and that this raises serious questions about his qualifications to sit on the Supreme Court of the United States.

In 1982, the Center for Constitutional Rights brought a case in the United States District Court for the District of Columbia, Sanchez-Espinoza v. Reagan, on behalf of nine citizens of Nicaragua, two citizens of Germany and one of France, alleging that they or their deceased relatives had been victims of atrocities committed by the contras, as well as on behalf of twelve members of Congress who claimed that U.S. support for the contras violated the Boland Amendment and the War Powers clause of the Constitution. The defendants were various executive officials, including the President, the Secretaries of State and Defense and the Director of the Central Intelligence Agency.

The complaint, supported by extremely detailed affidavits, alleged that the foreign plaintiffs or their relatives had been subjected to summary execution, murder, abduction, torture and rape, all as part of a plan authorized, financed and directed by the federal defendants to terrorize the civilian population of Nicaragua and foreign volunteers working in that country.

In the District Court, Judge Corcoran granted the government's motion to dismiss on the ground that the complaint presented a nonjusticiable political question. I argued the appeal on May 24, 1984 before a panel of the Circuit Court consisting of Judges Scalia, Tamm and Ginsburg. At the hearing Judge Scalia was, as is his custom, courteous and interested in the issues. He let it be known that he was not a devotee of the political question doctrine, a point on which I found myself in agreement with him, since, as a student of comparative law, I have never understood this doctrine, peculiar to United States jurisprudence, which holds that certain cases charged with political interest are not appropriate for judicial resolution even though they may involve violations of law.

There then ensued a very long silence. Finally, on August 13, 1985, nearly fifteen months after the argument, the Circuit upheld the dismissal of the suit in an opinion written by Judge Scalia, 770 F.2d 202.

It is a curious opinion. It begins by reciting the facts alleged by the plaintiffs concerning the atrocities committed by the contras and the responsibility of the defendants for those atrocities and by stating, as required by the Federal Rules, that, "for purposes of this appeal from a pretrial dismissal, we must accept as true the factual assertions made in the complaint". It states, as foreshadowed by Judge Scalia's comments at the Hearing, that, without necessarily disapproving the District Court's reliance on the political question doctrine, he chooses "not to resort to that doctrine for most of the claims". It then goes on to dismiss the various claims, one by one, in considerable detail. I shall deal here only with the claims of the foreign plaintiffs.

One such claim was based on the Alien Tort Statute, 28 U.S.C. §1350, which grants federal jurisdiction to aliens suing for a tort "in violation of the law of nations or a treaty of the United States". As to this, Judge Scalia holds that, insofar as the defendants are being sued in their private capacity, international law does not apply; a questionable holding, but let that pass. Insofar as the defendants are being sued in their official capacity, Judge Scalia concedes that, at least as to nonmonetary relief, i.e. relief by way of injunction, mandamus or declaratory judgment, the court has discretion to grant or withold such relief. But, he goes on to say, concerning "so sensitive a foreign affairs matter as this . . . it would be an abuse of our discretion to provide discretionary relief". Another reason for withholding the relief requested is that "[t]he support for military operations that we are asked to terminate has . . . received the attention and approval of the President, the Secretary of State, the Secretary of Defense and the Director of the CIA, and involves the conduct of our diplomatic relations with at least four foreign states".

Now this is a truly astounding, as well as alarming, statement. In the first place, the foreign plaintiffs never asked that "support for military operations" be discontinued, only that such operations be conducted without resort to rape, summary execution, torture and other gross human rights violations. Indeed, we said in our briefs and at oral argument that this was a case of international police brutality and should be judged by principles similar to domestic police brutality cases.

Everyone, myself included, agrees that, if Judge Scalia is to be faulted on any score, it is not on his intelligence. Why, then, this glaring analytical failure at a critical juncture of the case? It is, after all, not too difficult to distinguish between atrocities attendant upon an operation and the operation itself or to draw a line between war and war crimes. It is almost as if, by the time he reached page 208 of his opinion (as reported), the atrocities "accepted as true" on page 205 - "summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities" -

had slipped his normally alert mind. Could it be that Judge Scalia simply could not bring himself to conceive that the highest officials of our government might be guilty of crimes against humanity? Yet the atrocities committed against unarmed civilians by the contras and other surrogates of American policy abroad are a well known fact; at least one member of this Committee, Senator Kennedy, has played a leading role in exposing and documenting them. As recently as July 31, Anthony Lewis, in a New York Times column entitled "Don't We Care?", discussed the terror tactics of the contras in Nicaragua and another U.S. ally, Jonas Savimbi, in Angola, and suggested that "if Americans were asked whether any political cause could justify the deliberate maiming and killing of innocent civilians, most would surely reject the idea."

It is not likely that Judge Scalia refused outright to believe the allegations of the complaint. He is, in any case, too good a judge to reject factual allegations before a trial on the merits. No, it is more likely, and more in tune with Judge Scalia's view of the executive as the predominant branch of government, that he simply does not regard the courts as an appropriate instrument for curbing executive abuse, no matter how shocking to the conscience. But if so, why did he not, like Judge Corcoran below, resort to the time honored political question doctrine which so many judges before him have used to avoid dealing with troubling questions of legal limits on executive action? As I said, it is a curious decision.

There are other curious aspects to it. In footnote 5, Judge Scalia felt it necessary to explain why, in a previous case brought by the Center for Constitutional Rights, Filartiga v. Peña-Irala, 680 F.2d 876 (2d Cir. 1980), damages for torture were held to be recoverable from a Paraguayan police official, while, in Sanchez, sovereign immunity was held to bar such recovery from officials of the United States. The explanation: "The doctrine of foreign sovereign immunity is quite distinct from the doctrine of domestic sovereign immunity that we apply here, being based upon consideration of international comity, . . . rather than separation of powers". A strange message, it seems to me, to send to the world: a Paraguayan can sue for money damages in an American court for the death by torture of his son in Paraguay, but a Nicaraguan cannot bring such an action in an American court against American officials responsible for torture in Nicaragua.

One further aspect of the rather long and complex decision deserves attention in the current context. The foreign plaintiffs also sought damages for violation of their rights under the fourth and fifth amendments to the Constitution of the United States. Without reaching the question whether the protection of the Constitution extends to noncitizens abroad, on which there appear to be conflicting precedents, Judge Scalia found this portion of the complaint barred because "the foreign affairs implications of suits such as this cannot be ignored" and "the danger of foreign citizens using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist".

Again, the message is clear. In its starkest terms, it is this: Nuremberg never happened, and even though the most grievous atrocities may be committed abroad, as part of a regular pattern of conduct, by forces trained, financed, supervised and even directed by the United States, foreigners need not apply for relief to American courts.

I would like to end on a note of fairness to Judge Scalia. The Sanchez opinion which he wrote was unanimous. Our Petititon for Rehearing en Banc was denied. Nor has the Congress, in approving aid to the contras, shown any great sensitivity to American responsibility for the contras' crimes. It may be also, that we have not progressed very far since Judge Wyzanski, in a case in which a Vietnam draft resister was invoking the Nuremberg defense, said, in a moment of unusual candor, that you couldn't really expect a judge whose salary was being paid by the executive to consider whether the President was guilty of war crimes.

Nevertheless, it would be nice, if, at a time when terrorism and counterterrorism are increasingly becoming preferred instruments of foreign policy, the next appointee to the Supreme Court were one who had the courage to apply the law in favor of the victims, even where the perpetrators or their accomplices are high officials of the government of the United States. What is troubling about Judge Scalia, in this respect, is that, not content with the old-fashioned, sometimes even slightly embarrassed, "political question" evasion, he chooses to mount an elaborate, aggressive and superficially convincing defense of judicial abstention in an area which cries out for judicial intervention. Not judicial intervention, mind you, to make or unmake policy, but to redress and put an end to the most ancient, most direct and most universally condemned wrongs: assault, battery, torture, the slaughter of the innocent. As to all of this, Judge Scalia, in his finely crafted opinion, has said "Even if true, it's not the business of the courts". It was a difficult decision to explain to our plaintiffs, who included a woman doctor kidnapped by the contras and beaten, assaulted and subjected to multiple rapes, at a time when the CIA was intimately involved with contra operations.

Senator **Mathias**. Thank you, Mr. Weiss. Dr. Maddox, you referred in your statement to the *Lemon* case as establishing guidelines to test the constitutionality of any legislation which might run afoul of the establishment clause. You say you wonder if Judge Scalia would dismantle those guidelines.

Dr. **Maddox**. Yes, sir.

Senator **Mathias**. What is the basis of your concern?

Dr. **Maddox**. We are frequently known by the company that we keep, and one studies the associations of the Judge, particularly the American Enterprise Institute and other organizations, with which he spent a great deal of time. And these organizations are committed to the destruction of the wall of separation between church and state; they frequently criticize the *Lemon* decision, and other guarantors of this kind of protection.

And so it is not only by what the Judge himself has said and written. The stump from which he is hewn makes us look very carefully at Judge Scalia when it comes to religious liberty and the separation of church and state.

Senator **Mathias**. Do you feel that this indicates a bias on his part?

Dr. **Maddox**. Again, that question has been asked of other witnesses, and one cannot, of course, predict that kind of thing, but it does make us really uneasy, fearful, that the Judge comes to the Supreme Court with a bias toward some kind of establishment of religion, support of religion, by the Government.

Senator **Mathias**. Now, Mr. Weiss, you have a somewhat similar concern based on the *Espinoza* case.

Mr. **Weiss**. I do, Mr. Chairman.

Senator **Mathias**. Do you feel that this indicates a disposition or a bias on Judge Scalia's part?

Mr. **Weiss**. Well, I think it indicates a disposition on his part to consider the executive branch as the predominant branch of Government, and that is a very dangerous thing at a time when the executive is doing some things that it ought not to be doing, like right now.

It also indicates a lack of concern for fundamental human rights, which is an area of the law that has developed greatly in the last 20 or 30 years, and to which Judge Scalia, in this particular opinion, showed very little sensitivity.

When you dismiss a claim alleging multiple torture and rape and summary execution on the ground that it might be an embarrassment to the foreign policy of the United States, I don't think you are speaking as a judge. You are speaking as a Secretary of State. And you ought to be speaking as a judge if the case is presented to you from the other side of the bench.

Senator **Mathias**. Let me go back to Dr. Maddox. You are raising a question of whether or not Judge Scalia will observe precedents—we did question him on that subject and gained his assurance of the value that he places on precedents.

Did you by any chance hear that testimony?

Dr. **Maddox**. I missed that portion of it. I listened to a great deal of it, but I missed that portion of it.

Senator **Mathias**. Well, I'm sorry, because I would like to have asked you whether that allayed any of your fears.

Dr. **Maddox**. We hear what the man is saying and we judge him to be a man of integrity, but it is very difficult to change what seems to be a lifelong bent, a lifelong commitment. We have read that Supreme Court Justices do change their minds sometimes; we also have run across a few that do not change their minds or become more intent on the direction in which they are heading.

So our feeling is let's stop it before it gets started.

Senator **Mathias**. I see the Chairman has rejoined us, and I turn over the Chair to him.

The **Chairman**. Thank you very much. You don't have any other questions, Senator Mathias?

Senator **Mathias**. No, Mr. Chairman.

The **Chairman**. We want to thank you, and you are now excused—I mean, the questions are through. Thank you very much for your appearance.

Mr. **Weiss**. Thank you, sir.

Dr. **Maddox**. Thank you, Mr. Chairman.

The **Chairman**. Now, is James Carpenter here?

Will the testimony given in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Carpenter**. Yes, sir.

The **Chairman**. Have a seat. You have 3 minutes.

TESTIMONY OF JAMES CARPENTER, LIMA, OH

Mr. **Carpenter**. My name is James M. Carpenter, I live in Lima, OH, I represent myself as a radio common carrier licensed by the FCC, and I represent my wife, who is also present, my small family business which includes my family and my grandchildren.

We have a business named Carpenter Radio Co., and on the personal side of it we started in the business in 1965. We were a pioneer in the paging and radio business, and we had probably the first talk-back pagers in the United States in 1965.

The president of the telephone company come in with a goon squad—and that's United Telecommunications, United Telephone Co. today—unlocked our door, ripped out our equipment, stole our equipment.

I had to give you that background because that is the basis of my opposition to Judge Scalia.

Judge Scalia has been the general counsel, Office of Telecommunications Policy, Executive Office of the President; chairman of the Administrative Conference of the United States; Assistant Attorney General, Office of Legal Counsel, Department of Justice.

I've come across him several times in the time that I have been in this litigation purely because I believe—on a personal note again—no one could unlock my door, rip out my equipment and steal my equipment, which is against the fourth amendment of the U.S. Constitution; no one could do that—and every time I think of it today, I think of my trip to Berlin, which was sponsored by your predecessors, for the Potsdam Conference, and in that trip I went there to smell a million dead in the rubble and afraid then to occupy and watch America sold into the weak position in the world today.

Judge Scalia says he's against the Freedom of Information Act. He said that in his writing. I would not be before the Federal Communications Commission if it hadn't of been for the Freedom of Information Act. I went there, as part of appeals for the District of Columbia Circuit, and put case 75-1848, and they said that I could open my case upon stipulation of the FCC.

They didn't hear the case for a year. I went to the Freedom of Information Act, and when I went to the Freedom of Information Act the FCC became so disturbed they set the case for hearing without any issue. They spent millions of dollars per year on the case, and at the end of it they used the Judge to tell me that everything I said was frivolous and scurrilous.

As far as I am concerned, I've gone to the District of Columbia Circuit for redress of grievances on the whole matter, and I have not been able to get the information from the Clerk, but from the archives file, but I believe that Judge Scalia was one of the principal judges to deny me a redress of grievances or even to open the case up.

So I again had to go to the sixth circuit where they treated me with more disdain than I was treated at the U.S. Court of Appeals to the District of Columbia Circuit.

[Prepared statement follows:]

James M. Carpenter
607 W. High St.
Lima, OH 45801
8/5/86

United States Senate
Committee on the Judiciary
Dirksen SOB
Washington, D. C. 20510

TESTIMONY CONTRA TO APPOINTMENT OF ANTONIN SCALIA & AMENDMENT 1 PETITION REDRESS OF GRIEVANCES

James M. Carpenter (Carpenter) opposes the appointment of Antonin Scalia to the Supreme Court on the following Constitutional grounds.

In support of this opposition the following is respectfully shown:

1. James M. Carpenter is a veteran of World War II (nearly 5 years); served in the European theater with the 2nd. Armored Division, which was the first U.S. unit to enter Berlin. Consequently, I am aware of the devastation of war and my responsibility as an American citizen to protect the principles of our great country, one being equal justice under the law and that is my primary interest in my request to testify in this cause.

2. Carpenter has been in 22 years of litigation before the FCC, simply because of being a pioneer in the paging business and the FCC has allowed United/Telco to unlock our door, rip out and steal our equipment and violate the 4th Amendment in total disdain for any rights of Carpenter and the members of the small business class.

3. The FCC allowed its Administrative Law Judge to be under the influence of alcohol, while presiding over this litigation and spend nearly 12 years in total disdain for any rights of the Carpenters, thus, spending Millions of U. S. dollars to protect United Telco. The FCC has allowed United to sue Carpenter in the FDCNDOWD, while litigation was and is still pending at the FCC. While the litigation has been in the aforementioned Court, the presiding Judge has been seriously addicted to alcohol, during this interim, to the extent that he has had to serve and also be subjected to the "cure". I do not relate this to be disrespectful to anyone in the position as a Judge, but I firmly believe that fair and quality justice cannot and does not prevail from anyone who is subjected to alcohol addiction. Further, it is obvious that this illness has placed United's Counsel, Warren E. Baker (a former FCC General Counsel), in a position to take advantage of this Judge and keep Carpenter in litigation, which has made hundreds of thousands of dollars for Mr. Baker. The "bottom line" of this case being that the litigation should be moot for Carpenter was told by Judge Richey (of the D.C. Federal District Court) in the early stage if the litigation, that United only filed the Complaint to shut-up Carpenter. Consequently, admitting it was a scare tactics and actually no basis for the Complaint.

4. Antonin Scalia has stated that an agency decision should not be subject to judicial second guessing. Chaney v. Heckler, 718 F. 2d 1174 (1983).

5. "But the tradition has not come to us from La Mancha, and does not impel us to right the unrightable wrong by thrusting the sharpest of our judicial lances heedlessly and in perilous directions."

6. While General Counsel of the Office of Telecommunications Policy, Scalia developed his 1982 attack on the Freedom of Inforamtion Act, wherein he wrote: "It is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored." Scalia insisted that the FOIA's defects "cannot be cured as long as we are dominated by the obsession that gave them birth - that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press."

7. Carpenters' Complaint dates back to 1966 when the telephone company unlocked Carpenters' office door, "ripped out" its interconnection equipment, stole the equipment (never returned same), and put Carpenters out of business for two years (Carpenter being a Federal Licensee serving the public interest).

From this illegal act FCC Docket 18177 came into being. Carpenter was made many promises from United if Carpenter would only withdraw from this litigation. Carpenter was encouraged and advised by FCC Counsel, John M. Lothschuetz, to withdraw from this Docket to test the honesty and integrity of United, further stating that if United did not keep its promises to return to the FCC and the Docket would be re-opened. United failed the test and within six months John M. Lothschuetz (FCC Counsel, who advised Carpenter to withdraw without prejudice) became United's legal counsel with his office established in Mansfield, Ohio. The FCC refused to re-open the Docket so Carpenter prevailed upon the United States Court of Appeals for the D.C. Circuit (75-1848) for relief. John Ingle, the top trial lawyer for the FCC, promised this Court that Carpenter could request "Agency Action", originally requested in FCC Docket 18177. The FCC set on this request for one (1) year. Only under the FOIA did the FCC act, and then the FCC set the matter for hearing as FCC Docket 21256, without the Anti-Trust Issue (the "crux" of the litigation) and with an alcoholic ALJ, who libeled, slandered the Carpenters and gave United Telco the opportunity to "BRAG", how it would drive the Carpenters out of business.

8. Today, contrary to any right under "Due Process", Carpenter's cannot find a lawyer, who will not sell us out. Approximately 22 lawyers have sold us out, taken our money, and sold us out to the power of United/Telco. Still the U. S. spends nearly $800,000 to make Ed. Meese Attorney General, but he is "IGNORED", as he has stated that the FCC is "Politically Unaccountable", that it is a 4th Branch of Government, illegal under our Constitution, but now to confirm the appointment of Antonin Scalia, who is against the FOIA, and according to former FCC General Counsel, Bruce Fine, will never overturn an FCC Decision, is tantamont to destruction of any Rule of Law in the U. S.

9. Antonin Scalia has also stated that the Courts are "designed to protect the rights of even one man against the entire state." The single individual with one vote and no friends will have his day in court but will receive little help from the legislature .. (in part) .. However, my supreme concern is that he has acted contrary to the aforementioned statement. The bottom line of this Opposition is the Total Disdain exhibited by Antonin Scalia to the Constitution, in as much as the Executive Branch is given preference over the the legislative and judicial and the FCC, the Politically Unaccountable 4th Branch of government can do no wrong.

10. Thanks, to the TOTAL DISDAIN, for any "Due Process" by the FCC for the FCC and its FCC Bar Association can "LIE" to the Courts (supra), when they listen to one Pro se, which is seldom, and then use the power of the FCC to deny any licenses to Carpenter, permit the FCC lawyers, John Ingle, Michael Deuel Sullivan, Lewis Goldman, et al., to curse and swear at the Carpenters and be held immune as there will be no way to "fight back", without the Freedom of Information Act, which Judge Scalia is against. The FCC ignores the Carpenter Petition under Amendment 1 (Exhibit 1). Further, the President of the U. S. ignores the Carpenter Petition under Amendment 1 (Exhibit 2). The Courts also ignore the Carpenter Petition under Amendment 1 (Exhibit 3). Also see Exhibit 4.

11. What right does the U. S. have to spend all this money to destroy any Constitutional Rights of the Carpenter Small Family Business?? It should also be noted that MCI's top lawyer and Former FCC Commissioner sold Carpenters out (FCC Docket 19072), when "Proposed Findings" -- said -- "United stands convicted as a result of its own tesimony and evidence. Ken Cox made MCI the "giant" it is today because the FCC allowed him to represent Carpenter's and sell Carpenters out.

12. This is the real issue of this Opposition Contra, coupled with the statement/fact that Senator Strom Thurmond said on CNN that any citizen can tesify, plus Judge Bork has said that Pro se litigants are welcome at the Court of Appeals. However, with all the Judges you have now assigned on the Court of Appeals, it appears and is my great concern that there are now only more Judges to make lawyerism more like communism and deny the rights of people and increase the chances for more Alcoholics to Judge, when under the influence of Alcohol, which is highly against the Canons of Judicial Ethics, but ignored by "the powers to be". Further, from Antonin Scalia's past performance, his appointment would destroy the FOIA, which will inhibit any means of due process.

13. TOP LAWYER, JOHN INGLE, OF THE FCC HAS CONVINCED THE COURT, 22 YEARS LATER THAT CARPENTERS CANNOT REPRESENT CARPENTERS. THE RIGHT OF SELF REPRESENTATION IS DEAD.

14. The Carpenter small family business "Individuals" with one vote each and no friends has never had its day in Court. All lawyers who have represented the Carpenter, including Ken Cox, Esq., former FCC Commissioner and top lawyer for MCI have sold Carpenter out and Antonin Scalia has been General Counsel, Office of Telecommunications Policy, Executive Office of the President, 1971-72. Chairman, Administrative Conference of the U.S., 1972-74; Assistant Attorney General, Office of Legal Counsel, Department of Justice, 1974-77 and has never been concerned about the disdain of the Carpenter Constitutional rights by the President, The Justice Department, the FCC, et al.

15. Judge Charles R. Richey, met ExParte with former FCC General Counsel Warren E. Baker, who had sued Carpenter with the help of the FCC and its Bar Association simply because Carpenter told the truth that John M. Lothschuetz Esq., top lawyer for the FCC, told Carpenter to withdraw without prejudice from FCC Docket 18177 to test the honesty and integrity of United, and then in 6 months he became the top lawyer for United and worked for former FCC General Counsel Warren E. Baker, with FCC lawyer Carolyn C. Hill his top assistant.

16. Judge Ritchey said he would dismiss the action if Carpenter would not "Petition the Great President and would not Petition the Congress". Carpenter refused to give up the 1st Amendment. Further, the FCC has assisted its former General Counsel, Warren E. Baker, in every way to destroy Carpenter and its small family business.

16. No way can 22 years be crammed into this Oppostion Contra, but it should be noted that Carpenter is refused all licenses by the FCC, that as a pioneer we cannot grow, but anyone with no experience can get "Cellular Licenses, et al." to compete with Carpenter. The FCC has no regard for the Constitutional Rights of the Carpenter Small Family business.

17. The Affidavits attached show the Carpenter witnesses state the FCC ALJ was under the influence of Alcohol (Exhibit 5 attached). The Certified Copies, show Judge Nicholas J. Walinski, has been arrested two times for DWI, and spent 3 days in the Toledo Workhouse, and 28 days in detoxification. The Constitution still states under Article III, Section 1 that Judges serve during good behaviour and it is respectfully submitted that "Public Intoxication" in not good behaviour. Further, the rules and ethical considerations require that a Judge (Canon 3 B(1) a Judge should take or initiate appropriate meansures against a Judge or lawyer for unprofessional conduct of which the judge may become aware.

18. For the ALJ and Judge Walinksi, to be under the influence of Alcohol and the facts ignored by the Sixth Circuit, their fellow judges, the Justice Department is not, according to the will of the Forefathers, and is not Constitutional. While Carpenter has not been able to secure, the record from the Court of Appeals, DC Circuit 80-1621 et al., it is believed that Judge Antonin Scalia was part of the denial of any rights to Carpenter by that Court, even though one Judge, who Carpenter now believes to be Judge Wald, voted for recusal and the censure and suspension of those who held the Carpenter Constitutional Rights in total disdain. It should be noted in this connection that FCC Lawyer, John Ingle, tells Carpenter that the Clerk, Mr. Fisher, made the Order and that he had a right to do so under the Administrative Rules of the Court.

19. Steven S. Melnikoff, Esq., the attorney in FCC Docket 21256 for narly 12 years, sold Carpenter out and became the top attorney for Southwestern Bell. James O. Junitilla, Esq., as head of the trial staff, retired and the other FCC lawyers have made a joke of the Carpenter plight to the extent that United has been given ok by the FCC to destroy the Carpenter interconnection, deny lines and circuits and steal the Carpenter equipment, thus denying Carpenter the rights afforded other "Common Carrier in Similar Situated Circumstances". Nothing but discrimination and preference in violation of 202(a) of the Communications Act, of 1934, as amended.

Where are the rights of the Individual against the Entire State? It appears to Carpenter that Judge Antonin Scalia has failed, by his past performance, at the FCC, to exercise these rights. Therefore, it is questionabble and very doubtful that he will exercise the rights of the Individual in his appointment as Judge of the Supreme Court. The United States Constitution is the basis of our judicial system and our liberty as an United

States citizen. Therefore, it is mandatory that a Judge exercise these rights for each individual coming under the scrutiny of the Supreme Court. Emphasis added: if Judge Antonin Scalia has ignored the Individual's Constitutional Rights by his past performance then his desire/ability to abide by same must be challenged in his appointment as Judge of the United States Supreme Court.

Respectfully submitted,

James M. Carpenter 8/5/86

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James M. Carpenter
607 W. High St.
Lima, OH 45801
6/3/86

President Ronald Reagan
President of the United States
White House
1600 Pennsylvania Ave.
Washington, D. C.

Dear President Reagan

The forefathers of the United States of America mandated three branches of government.

The executive.
The legislative.
The judicial.

Today, we have just one. THE LAWYERS.

Today, the powers talk about drugs, alcohol, etc, but Federal Judges are excused time in and time out from driving while drunk (Proof attached).

Time for action -- as the type of action you could initiate would save America.

God Bless America.

Respectfully submitted,

James M. Carpenter

EXHIBIT 1

RECEIVED
JUN 25 1986
JOHN P. HEHMAN, Clerk

No. 85-3942
No. 85-4011

RECEIVED
JUN 27 1986
[illegible]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES M. & MIRIAM G. CARPENTER)
d/b/a CARPENTER RADIO COMPANY,)
Petitioner,)
v) 85-3942
FEDERAL COMMUNICATIONS COMMISSION)
AND UNITED STATES OF AMERICA,)
Respondent,)
- - - - - - - - -) O- R- D- E- R-
JAMES M. CARPENTER,)
MIRIAM G. CARPENTER)
JAMES M. CARPENTER, JR.,)
Petitioners,)
v) 85-4011
FEDERAL COMMUNICATIONS COMMISSION)
AND UNITED STATES OF AMERICA,)
Respondents.)
UNITED TELEPHONE COMPANY OF OHIO)
Intervenor-Respondent.)

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JUN 27 1986
JAMES H. QUELLC

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JUN 27 1986
MIMI WEYFORTH DAWSON
[illegible]

BEFORE: KEITH, MARTIN and GUY, Circuit Judges

6/27/86
KP

PETITION FOR STAY OF ISSUANCE
OF MANDATE AND PETITION FOR HEARING, REHEARING, RECONSIDERATION OR WHATEVER
RELIEF MAY BE JUST, AND SUGGESTION FOR HEARING OR REHEARING EN BANC

The appellants respectfully request this Petition for Rehearing as captioned be applied and asks that the suggestion for Hearing or Rehearing En Banc be granted as an alternative, as the basic foundation of the American Way of life and its Constitutional Guarantee of Equal Justice lies in this request. In support of this request the following is respectfully shown:

CONCISE STATEMENT OF THE THE ISSUES PRESENTED FOR REVIEW

1. The Federal Communications Commission has promoted this case and used same with "Political Unaccountability" for nearly 22 years. The main issue of this case, the violation of the 4th Amendment, had long been buried under "FCC legalized illegality". The FCC has encouraged United Intervenor to lie to Petitioner Carpenter and to break all contracts express and implied. The FCC has used the Carpenter small family business to accomplish its purposes.

(1) Secure Jurisdiction of the Interstate (FCC Docket 18177).
(2) Create a Tariff for Satellite (FCC Docket 20099)
(3) Create NARS/Telocator for the members of the FCC Bar Association (FCC Docket 21256).
(4) Make huge amounts of revenue for the FCC Bar Association's members and make those members the "Chief Players", in Cellular (FCC Docket 21256, et al.).

2. Petitioner Carpenter was a pioneer in the paging (Beeper) business. In 1965 Carpenter was granted KQK 730, for the purpose of Common Carrier Service, one way paging and two way radiotelephone. In 1966 the Carpenter growth seemed to be phenononal, and the President of Lima/United Telephone Company of Ohio/ United Telecommunications, Inc., coveted the Carpenter twelve customers so much

that he came in with his "Chief Engineer", unlocked the Carpenter door, "ripped out and "stole" the Carpenter equipment. Consequently, this 4th Amendment violation has been protected for all 22 years by the FCC, PUCO, the Courts, Justice Department, et al., as the Carpenters were not considered and thus United, with all its power, is so in charge at the "Politically Unaccountable FCC" that the violation of the 4th Amendment, without any "Warrant", has been buried by the "Politically Unaccountable FCC", who only takes care of the "Privileged Few", who are fortunate enough to have an FCC Bar Association Lawyer represent them.

3. In this connection it must be noted, that former Supreme Court Justice Abe Fortas, attempted help for Petitioner Carpenter, when he was the lawyer for NARS/Telocator. In the last Las Vegas Meeting of NARS/Telocator and just before his death, he had "Larry Harris", promise that he would go back to Washington and straighten out the Carpenter cause. Abe Fortas died, and Larry Harris became the Chief of the "Mass Media", and assisted Commissioner James Quello in making the "Broadcasters" elgible as "Competitors" to Petition Carpenter in paging and whereas Carpenter is even denied by the FCC the right to file for any Cellular, or other licenses by the FCC. The Broadcasters, like WIMA, are selling their stock to United's lawyers, so that they can go into Cellular (Larry Harris, Esq., can explain to Abe Fortas, "In Heaven", his broken promise). WIMA/WIMI(FM) File Nos. BAL. 85 0906 HQ, BALH 85 0906 HR, granted by non-lawyer and economist Larry Eads, even when it was proved that this was United's lawyers taking over the Public Interest News Media, and they had conspired to file "BAR COMPLAINTS", against the Carpenter lawyer, Philip N. DePalma. What a clever way to win a law suit, but it must be stated in defense of the Constitution, that this is not equal justice to allow non-lawyer Larry Eads to practice law for the FCC, but FCC lawyers Ingle/Greenspan tell the Sixth Circuit to order that Carpenter cannot represent Carpenter. In this connection, FCC Engineer Bennett practices law, by making legal decisions for Abe Leib, Greenspan, Michael Deuel Sullivan, Myron Peck, et al., and this is why the FCC has denied any and all of the Carpenter license applications, on a discriminatory "selective enforcement" basis.

4. Robert H. Snedaker, Jr., the Vice Chairman of United, "blew up" the America Flag to close the United Stockholders' Meeting, held at Ohio State University, Lima, Branch. Robert H. Snedaker, Jr., on the 12th, 13th of May 1986, was flown to Lima, Ohio for Carpenter to take his deposition. What expenses, a Lear Jet with two (2) pilots, and one of the "top paid" lawyers in the United States, Warren E. Baker, Esq., flying with him. In addition,

Warren E. Baker brought John W. Solomon from Akron, of the law firm of Brouse & McDowell, with nearly 100 lawyers on the letterhead. What power as Carpenter is told that Mr. Solomon's law firm has handled all the "Firestone Millions" and the "Seiberling Rubber Millions". From what Petitioner Carpenter can ascertain all of the "heirs" are the "Jet Set", with the exception of Congressman John F. Seiberling, who it appears is about to retire.

5. The foregoing is to illustrate the "Millions" spent by United/FCC, et al., to destroy Petitioner Carpenter. Right is Might and they are spending all these millions to destroy Carpenter and the Right. The question becomes, where do they get all this money to spend on the destruction of Petitioner Carpenter and his small family business? The "ANSWER", they get it from the "Politically Unaccountable 4th Branch of Government" -- The FCC/PUCO, who have given United Telecommunications, Inc. over $2 Billion dollars in dividends, a huge part of which has been given for the use in the destruction of Petitioner Carpenter and the GENOCIDE, they have inflicted on the Carpenter small family business, of which James M. Carpenter is a cognizable member.

6. The PUCO/FCC are not only "Politically Unaccountable", but they are a 4th Branch of Government, illegal under our Constitution, which only allows the Executive, Legislative and Judicial. The FCC/PUCO are created in "Scam" in violation of Article I, Section 8, Clause 8 (Patents & Copyrights).

> 8. "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The FCC/PUCO, being "Politically Unacountable 4th Branch of Governement", were created in "legalized illegality", to protect United Telco/ATT&T, but regardless of the "Scam", long ago perfected by "Bell" to "Piggy Back" the Telephone on the Railroad Commission. The creation was still "Constitutionally Illegal", as the States had no jurisdiction to violate under Compact, under the Supremacy Clause" of the Constitution. This, "Bell" was able to do with lobby and later the Communications Act, of 1934, as Amended was "slipped" through the Congress, because of the "Bell Labs" being able to visualize Satellites, the thrust into the "outer space" of the satellites, spheres and missiles. The Congress did not understand, so again under the pressure of the "Washington Law/Lobby Offices" of United/AT&T, et al., this Constitutional violation succeeded and the FCC was created as "an illegal 4th Branch of Government", and this has all been OK'd by Judges, who violated their oath and allowed the FCC to violate the Will of the Forefathers, in Article I, Section 8, Clause 8, because the PUCO/FCC are only created as a way to allow the use of the "Bell" discovery forever. Still a violation of the intent of the forefathers, and must be stopped or the Constitution is destroyed.

7. Chief Justice Warren E. Burger, having just retired, is to take over the "Constitutional Celebration", but Chief Justice Burger may have many allocates, but Carpenter has his memory of The Honorable Chief Justice Burger. The FCC sent top FCC lawyer Louis H. Goldman, with Engineers Busemi and Harris to Lima, Ohio at U. S. Government Expense. FCC Goldmn permitted United Telco/AT&T to allow important Teleocator Board of Director Member, Richard Plessinger, use a "Black Box" and thus receive "free long distance service" from AT&T/United Telco. However, when Carpenter reminded FCC lawyer Goldman of this and simply asked the question, why is this Ok for Plessinger and not for Carpenter (asked in the offices of United/Telco, and in front of all those Telco Executives), FCC lawyer Goldman cursed, swore at James M. & Miriam G. Carpenter, called them dirty "SB's" (sic), threatened to destroy them, take away their FCC licenses and ended his 15 minute tirade, cursing and swearing at the Carpenters, by saying I hope you have this on your "GD" "f" four letter word tape recorder, you "SB" (sic). Petitioner Carpenter asked for a Stay of Mandate, et al., before Chief Justice Burger, on these facts and after showing the Chief Justice the cursing and swearing (supra) by FCC lawyer Goldman, the Chief Justice in one word approved that cursing and swearing when he "denied" that stay. While the Bands are playing and the innocent children are singing the Celebration before Chief Justice Burger, Carpenter still has his memory. Petitioner Carpenter, on the suggestion of Congressman Michael Oxley (4th Dist), went to Congressman Rodino and asked that Chief Justice Burger be impeached on the "Precedent" of Justice Samuel Chase, who was impeached for Constitutional Crimes in 1803, but after many inquiries, Mr. Rodino would never respond. Further, former FBI man and now Congressman Oxley, issued orders that Carpenter could not come to his office, write his office or call his office, which is a 1st Amendment denial, but when Carpenter went to the "House" to see what he could do to impeach Oxley for this Constitutional disdain, the man giveing the rules, stated - What would you expect of Oxley, a former FBI man.

8. Petitioner Carpenter went to the Court of Appeals (D. C. Circuit) and told them about this, but they did not want to hear the tapes and immediately ruled against Carpenter. It appears that the new appointment for Justice of Antonin Scalia is to continue the "Special Treatment" of the "Politically Unaccountable FCC", as Former FCC lawyer Bruce Fine has stated on the "NEWS CNN" that Judge Scalia would never overturn an "Agency Decision".

9. It appears to Petitioner Carpenter, that Judge Scalia has already taken care of the FCC, in the Carpenter cause, as Carpenter was denied En Banc

by the DC Circuit, on the basis of No Judge would voice a VOTE, so your request EnBanc dies for lack of a second. While this appears to be 1982, after Judge Scalia came to the Court of Appeals, D. C. Circuit, the certified copies are being sought from the "Records Center".

10. The Court cannot make the law, but they are under a "Constitutional Duty", to uphold that which is law, or "DECLARE" same illegal. The State of Ohio was not admitted to the Union, until Public Law 204, was acted upon by a Joint Session, and signed into law by President Eisenhouwer in 1953. This Public Law 204 only allows one (1) Ohio Constitution, that being the Constitution of 1802, which was "Republican Form", and the Ohio Bar Association, who has "directly/indirectly" stated Carpenter cannot represent Carpenter, is illegal as that Ohio Bar Association is operating under the Ohio Constitution of 1851, which has never been approved by the United States and thus is outside of the "Compact". Public Law 204 requires that the Court Declare the Ohio Bar illegal. IT IS HEREBY REQUESTED THAT THE SIXTH CIRCUIT DECLARE THE OHIO BAR ASSOCIATION AS ILLEGAL AS IT OPERATES UNDER THE OHIO CONSTITUTION OF 1851,ET AL (ILLEGALLY).

11. The Supreme Court of the United States has just ruled in Louisiana Public Service Commission v. Federal Communications Commission 106 S.Ct1890 (1986) the FCC/PUCO are charged with a "Joint Jurisdiction:

1. Carriers Key 12(5) Regulated carrier is entitled to recover reasonable expenses and fair return on its investment through rates it charges its customers.

2. States Key 4.10 Supremacy clause provides Congress with power to preempt state law. U.S.C.A. Const. Art. 6, cl. 2.

3. States Key 4.10 Preemption of state law occurs when Congress, in enacting federal statute, expresses clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law barrier to state regulation, where Congress has legislated comprehensively, thus occupying entire field of regulation and leaving no room for states to supplement federal law, or where state law stands as obstacle to accomplishment and execution of full objectives of Congress.

12. EnBanc is necessary here, as all three "Keys" apply to Petitioner Carpenter and its small family business. The FCC forced Carpenter to receive a Regulated Public Utility Status, being PUCO #10. This was agreed to by the FCC/PUCO as part of FCC Docket 18177, which is this cause, now nearly 22 years old. The Utiltity Status granted Petitioner Carpenter, is designed by the FCC/PUCO conspiracy to deny Petitioner the entitlement to recover reasonable expenses and fair return on its investment. The FCC has spent Millions of $'s on the case to by-pass the Supremacy clause of Key 2. It has used its lawyers Abe Leib, Michael Deuel Sullivan, Stephen S. Melnikoff, James O. Juntilla, Herbert H.

Wilson, Myron Peck, Kelly Griffith, John Ingle, Greenspan, et al. to deny the Supremacy clause under key 2, 3 and leave complete "FRUSTRATION", to the point that United now uses Warren E. Baker, John W. Solomon, Paul H. Henson, Robert H. Snedaker, Jr., Gary S. Miller, James Gadd, Dick Young, et al., as people to promote an outright or actual conflict between both federal and state law, with the stated intention, driving Petitioner Carpenter out of business.

13. It should be noted in this connection, that Friday June 13, 1986, an insider at United called and explained to Carpenter, without telling his name, that United is going into its base station room above the 3rd floor, at 122 S. Elizabeth St., throwing carriers at Carpenter, to set off his pagers and "harrass" the Carpenter customers. Ernie Berenz, James Gadd, Joe Losito, et al., think this a "joke", because they know that the FCC will hold them harmless. Further, the PUCO Chairman, Tom Chema, will do nothing, as he just made a special trip to Lima, Ohio telling the "News Media", that he was there to look out for the "Public Utilities", but he did not pay any attention to the "Regulated Carrier Carpenter". Instead, Mr. Chema visits "Teledyne Steel", who is not a carrier, to see what he can do to reduce its rates, ignoring the Carpenter problems, but it is all a frustration of the "Public Interest", against the intent of the Policy so clearly shown in Louisiana (supra). Further, it is against the Ohio Racketeering Statutes (Little RICO Am. Sub. H.B. No. 5) passed in conjunction with the decision of the United States Supreme Court in the case of Sedima v. IMREX Co., Case No. 84-648 U.S. Sup.Ct. (July 1, 1985), 53 LW 5034. and the U. S. Racketeering Statutes, 18 U.S.C.S Sec. 1851- Congressional authority to enact 18 USCS Sec. 1985 is bottomed upon powers conferred by USCS Constitution. Article I, Sec. 8, cl. 3. United States v. Varlack (1955, CA2 NY) 225 F2d 665. as it is a clear conspiracy by the PUCO/FCC and its lawyers (supra) to destroy Carpenter and its family.

14. The FCC had its Administrative Law Judge John H. Conlin on this case for approximately 11 years, and the Petitioner Carpenter's Affidavits state that the "ALJ was intoxicated", while on this case, which does not allow for a decision that is rational or prudent or equal justice under law. Further, in this connection, the FCC has encouraged former FCC General Counsel Warren E. Baker to file in the Federal District Court (C 81-592) against Carpenter on nearly the same parties and issues before the FCC in this cause destroying any semblence of Stare Decises, when the Sixth Circuit Orders Carpenter cannot represent Carpenter, but Judge Walinski dismisses Diana G. Dulebohn, Esq., from the Carpenter cause and states Carpenter must represent Carpenter. The question is what happened to equal justice? The Answer Carpenter cannot find a lawyer

and the "Illegal Ohio Bar Association" is looking out for Warren E. Baker, John W. Solomon, et al., with the help of the "Politically Unaccountable FCC/PUCO", who have conspired with all including NARS/Telocator to destroy Carpenters.

15. Warren E. Baker, John W. Solomon, with full assistance of the FCC, have kept Carpenter in this cause for nearly six (6) years. First the Case was filed with Judge Curran, who one clerk stated was sick and another said he is sick of the case. The case was then transferred to Judge Charles R. Ritchey, who met ExParte before one hearing with Warren E. Baker and transferred it to Judge Nicholas J. Walinski, where it became (C 81-592 FDCNDOWD). Here the cause has been used to keep Carpenter from any growth and make a fortune for Warren E. Baker/John W. Solomon (supra). Judge Walinski has ordered Carpenter to answer Interrogatories over and over, because Baker/Solomon are not pleased with the Answers.. Further, Judge Walinski has also ordered Carpenter for deposition on top of deposition but allows Warren E. Baker and John W. Solomon to refuse to divulge the Millions of $1's spent on this cause, while they are fully protected by the FCC and the PUCO, who are protecting United to take over the Carpenter area, while Carpenter is denied any licenses for growth by the FCC. The FCC/PUCO has just said that it is OK for Alltell/United Telespectrum, Inc. to take over the Carpenter paging area, and the PUCO has just done so with such disdain for Carpenter that it has sent its denial of the Carpenter protest in an envelope marked "John Carpenter", and refused to send the entire order. This not only "Frustrates" the will of the Congress in the Act (supra), but it denies Carpenter, a Regulated carrier, the entitlement to recover reasonable expenses and fair return on its investment, because of the Predatory, Monopoly power of Alltel/United destroys any fair return.

16. In this connection, Judge Walinski was arrested for DWI and sentenced to 3 days in the Toledo Workhouse. Judge Walinski was arrested for the second time and spent 28 days in detoxification. Judge Walinski has been excused by his "peers", but he is still only serving his life appointment, during good behaviour (Article III, section 1). Public Intoxication, is not good behaviour, and Judge Conlin and Judge Walinski have contributed to the "Genocide" against the Carpenter small family business, while in no condition of mind to render any order or pass any judgment. Therefore, it is respectfully requested that the Sixth Circuit "DECLARE" all orders or Judgments of both Judge Walinski and ALJ Conlin "VOID AB INITIO", as proven "public intoxication" should void their Orders issued under the "Cloud of Alcohol".

17. The Congress has just approved the treaty against "GENOCIDE", and the intent of the Congress is right in point with what the "Politically Unaccountable FCC/PUCO" have allowed to happen to the Carpenter small family

business. The Congressional Record - Senate - S1355 - February 19, 1986 .. (in part) any nation so diseased as to be predisposed to commit genocide is not going to be prevented from doing so because of its lack of respect of international law. Those who commit genocide do so out a desparation to hold power. They use genocide as a tool to eliminate political opposition to their rule. The base motivations of these tyrants are not going to be altered by .. treaty. The "Tyrants" at the PUCO/FCC, coupled with the Tyrants at United Telco/AT&T, out of desperaton to hold power, have used genocide as a tool to try and eliminate the Carpenter small family business. The "Tyrants" (supra) have caused my son to have a nervous breakdown, have caused "High Blood Pressure' et al., to my wife and heart problems to my daughter-in-law, which the Doctors have diagnosed as purely "stress". All this time the FCC/PUCO have assisted in every way the denial of all licenses to Carpenter, they have assisted all competitors, Jim Kennedy, Ralph DePalma, Matrix, Paul Shin, Frank B. Cory, Alltell, United Telespectrum, Inc., in taking over the Carpenter franchised area, and Carpenter can have no protection, because all have "Tyrants', have conspired to deny Carpenter service afforded others, under similar situated circumstances and all have conspired to destroy by GENOCIDE the Carpenter small family business, of which Petitioner Carpenter is a "congnzable member".

18. Pages 12 & 13 will prove the FCC/United/PUCO, et al. "SCAM" where FCC lawyer Ingle promised the Court (75-1848 DC Cir)(1975), in as much as Case 18177 was "without prejudice", Carpenter could request Agency Action originally requested in 18177. For 12 years the FCC pretended to hear 18177, but with no issues. A "true copy" has just been received from the DC Circuit. This is incorporated herein as page 12, 13 (supra). The Order (per curiam) is two fold. It states that 18177 can be re-opened and the Complaint dismissed upon representation of FCC Counsel.

19. The "Scam" is that the per curiam Order was sent to the "Archives" and the Docket Sheet only stated that the case was dismissed. This appears to be the basis for the FCC lawyers to now tell Carpenter the case was dismissed in 1968, but it should be noted in this connection, that the FCC never said that for nearly 11 years. This was never said until they had taken complete care of United and promised to destroy Carpenter and his small family. Therefore, only a full hearing would afford Petitioners Carpenter equal opportunity to present the true facts referred to in this document concisely, clearly, and dramatically that prove the Genocide, discrimination, anti-competitive actions. Such an order would grant Carpenters the rightful opportunity for which they have so arduously

expounded on to "deaf ears" for 22 years. No American citizen, encompassing a small family business and a Federal Licensee, should be subjected to the discrimination, abuse, of rights, genocide, etc that has been inflicted/enforced upon the Carpenter small family business (Page 12 & 13 show that "Scam" - Carpenter holds Originals).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1848

September Term, 1975

ROBERT A. BONNER
CLERK

FILED DEC 22 1975

United States Court of Appeals
for the District of Columbia Circuit

James M. and Miriam G. Carpenter
d/b/a Carpenter Radio Company,
Petitioner

v.

Federal Communications Commission
and United States of America,
Respondents

Before: Bazelon, Chief Judge and Robinson, Circuit Judge

O R D E R

On consideration of respondent's motion to dismiss, petitioner's response in opposition, and, upon representation of counsel for respondent, it appearing to the Court that respondent's order in docket No. 18177, adopted September 5, 1968, is without prejudice and that it remains open to petitioner to renew its request for agency action originally requested in docket No. 18177, it is

ORDERED by the Court that the aforesaid motion to dismiss is granted.

Per Curiam

A true copy:
Test: George A. Fisher
United States Court of Appeals
for the District of Columbia Circuit
By: Trisha Hall, Deputy Clerk

75-1838

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

75-1838

DATE	FILINGS -PROCEEDINGS	Filed
(K)8-28-75	4-Petitioner's petition for review of an order of the FCC (m-28)	
(K)8-28-75	Certified copy of the petition for review was mailed to FCC and the U.S. Attorney General; the petition for review was sent by certified mail, return receipt requested	
(C)9-25-75	4-Respondent's (FCC) motion to dismiss petition for review (m-25)	
(G)10-6-75	4-Petitioner's response to motion to dismiss (m-6)	
(G)10-9-75	Certified Index to Record (r-3)	
(K)11-18-75	15-Petitioner's Brief (m-18)	
(K)11-18-75	4-Petitioner's motion to dispense with the requirements of reproducing the record (m-18)	
(G)11-26-75	4-FCC's motion to defer filing date for responsive brief pending court considerati of motion to dismiss (m-26)	
(G)11-26-75	4-Petitioner's response to motion to dispense with the requirements of reproducing the record (m-26)	
(P)12-8-75	4-Petitioner's opposition to FCC Motion to defer filing date for responsive brief pending Court consideration of motion to dismiss (m-8)	
(p)12-8-75	4-Petitioner's reply to response to Motion to dispense with the requirements of reproducing the record (m-8)	
R)12-22-75	Per Curiam order that the motion to dismiss is granted; CJ Bazelon and Robinson, CJ	
(K)12-12-75	Order per CJ Bazelon that petitioner may file, in xerox form, seven copies of the relevant portions of the record, suitably indexed, in lieu of the printing requirements of an appendix set forth in the FRAP	
2-23-76	Receipt from FCC dated 2-9-76 for Certified Index to the Record.	

A true copy:
Test: George A. Fisher
United States Court of Appeals
for the District of Columbia Circuit
By: Tricia Hall Deputy Clerk

WHEREFORE, in view of the foregoing, which shows the Court that Carpenter is denied equal justice under law that he cannot find a lawyer, but this Court has ruled against self representation; that we have shown the Court that the Ohio Bar Association is Illegal under Public Law 204; that Carpenter has shown the Court that the FCC/PUCO are Illegal 4th Branches of Government and are totally "Politically Unaccountable". Further, Carpenter has shown the Court that the rulings of the FCC/Court should be Declared Null & Void -- Ab Initio, as the Judges were under the influence of Alcohol. The Court, in view of the Genocide against the Carpenter small family business, should act "EnBanc" to declare the matters shown against the Carpenters UNCONSCIONABLE as it destroys the Constitution during this Celebration. Further, this case proves that United "Blew Up" "the U.S. Flag" to close its stockholders' meeting, and that the "Anti American" act should convince the Court that this Case should be declared UNCONSCIONABLE on the part of all the Courts' Agencies (supra), who have denied "Speedy Justice", by forcing this cause to drag on for nearly 22 years, just to make power, money and prestige for members of their Bar.

Further, prayed Court grant an Order which forces United et, al., to grant the service afforded others under similar situated circumstances, as this is what was granted by the forefathers as the American Way of life. It should be also stated in this connection that Carpenter served in World War II, being discharged as a Captain and did his part to preserve these rights and should in turn be afforded the opportunity to enjoy that for which he assisted in perserving as a soverign citizen. The 22 years wrong should be made right by the Court.

Respectfully submitted,

6/25/86

James M. Carpenter, Pro se

Miriam G. Carpenter

Miriam G. Carpenter, Pro se

James M. Carpenter, Jr., Pro se.

Individually & dba CARPENTER RADIO COMPANY-607 W. High St., Lima, OH 45801
(419) 222-9926

CERTIFICATE OF SERVICE

I, James M. Carpenter, have mailed a copy by U. S. Mail, postage prepaid of
No. 85-3942 No. 85-4011

PETITION FOR STAY OF ISSUANCE
OF MANDATE AND PETITION FOR HEARING, REHEARING, RECONSIDERATION OR WHATEVER
RELIEF MAY BE JUST, AND SUGGESTION FOR HEARING OR REHEARING EN BANC

TO:

Brian L. Buzby
Carolyn C. Hill
John A. Rozic
United Telephone Company of Ohio
United Telecommunications, Inc.
Mansfield, Ohio

The Secretary FCC - for
John Ingle
John P. Greenspan
FCC
Washington, D. C. 20554

Ed Meese
Attorney General of the U.S.
Justice Deparment
Washington, D. C.

6/25/86

James M. Carpenter

Ⓒ - 1986 - James M. Carpenter, 607 W. High St., Lima, OH 45801, claims copyright to this document, as part of his book - The COYDADS.

James M. Carpenter
607 W. High St.
Lima, OH 45801
6/26/86

EXHIBIT 4

Senator

Why is it Ok?

1. The FCC has condoned the following actions against my small family business. Unlocked our office, "ripped our" our equipment, stole our equipment, and put this small family business out of business, and thus has been protected by the Courts, FCC/PUCO for 22 years (This is a 4th Amendment violation).

2. Why is it OK for the Court to deny me an attorney, but refuse to allow me to appear Pro se, and deny any respect? The FCC/PUCO and the Courts have treated me as a non-person, somewhat lower than a "cockroach".

3. Why is it ok to have drunk Judges on the Bench?

4. Why is it OK for United Telephone Company of Ohio, "to blow" up the America Flag to close its stockholders' meeting (at Ohio State U) and then its Chairman Paul H. Henson, is appointed by the President to the National Security Council for Communications?

5. Why is the FCC allowed to send its lawyers on fact finding trips to Lima, Ohio and curse, swear, and use vulgar language at my wife and myself in the offices of United Telephone Company of Ohio, the very people we were complaining about?

6. You have voted for the "Genocide Treaty". Why is it OK to commit Genocide against my small family business?

7. Why do you allow the FCC to continue as a "Political Unaccountable 4th Branch of Government", when the Constitution only allows 3 Branches of Government?

These are just a few of the questions that are shown in this En Banc request to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

James M. Carpenter

AFFIDAVIT

EXHIBIT 5

State of Ohio)
ss:
County of Allen)

1. I, Miriam G. Carpenter, am a partner in Carpenter Radio Company and have been involved in the eighteen (18) years of litigation with the telephone company and deem it necessary to reveal the following opinion and circumstance.

2. After reading and re-reading Judge Conlin's Initial Decision I am amazed, astonished, and actually provoked, primarily with the Judge's accusation on page #24 where, in essence, he states that Carpenters' "Proposed Findings and Conclusions of Law" was the most scurrilous pleading that he has ever had the misfortune of reading. Reading that statement made me vehement. If Carpenters had not had the eighteen years (16) misfortune of problems with the telephone company Judge Conlin would not have encountered his misfortune.

3. In 1965 I accompanied my husband to the PUBLIC UTILITIES COMMISSION OF OHIO to discuss the interconnection policy (we were pioneers in the RCC industry) and during the course of conversation with Mr. Sam Beetham, an attorney at the PUCO, he stated, "Mr. and Mrs. Carpenter what you don't understand is that the PUCO is for the protection and benefit of the telephone companies and not the public." Along with that statement, I recall what United's executive, Mr. Ray Askins, said at the time he ordered our interconnection disconnected. During the conversation he made it known that it was United who ordered it disconnected and then he very indignantly said, in effect, that with all the legal delay, legal expense, etc. they would put us out of business.

4. Due to the aforementioned remarks it appeared to me at the time the telephone company "ripped out" our equipment and stole same that we would be facing a struggle but when one is right then the issues must be faced and put forth every effort for a victorious ending.

5. After reading Judge Conlin's remarks, using the word scurrilous, I cannot find any statements made by the Carpenters that had any intent of a clownish response, vulgar, etc. It is a matter of financial survival explaining the conspiracy and anti-competitive tactics that in our opinion has existed and the position of United to keep Carpenters from progressing and adequately serving the public interest.

6. Judge Conlin's conclusions appeared to me to be redicule and also reflect on my credibility and character throughout the RCC industry and in the community where I have resided for 67 years and maintained a reputable business and professional status.

7. For the aforementioned reasons I deem it necessary to expose an opinion that I formed during the hearing held in Lima, Ohio in July and August, 1979.

8. I was on the witness stand for approximately 3 days. As I recall the first day I took the witness stand was immediately after the lunch break and I detected the extreme odor of alcohol on the Judge as he was sitting at the bench and I in the witness chair. This continued during the three days of my entire witnessing. This was my opinion from his countenance and demeanor the first morning of convening the hearing and during the entire hearing but my thoughts and opinion were substantiated when I took the stand.

9. In all due repsect, I have been reluctant to make this statement but find it extremely necessary after reading page #24 of the Initial Decision.

10. As a citizen, who must depend on the Courts for justice, I have been concerned, disappointed, etc. to encounter the aforementioned circumstance and I am at a loss to understand how qualified justice can be rendered under the aforementioned circumstance.

11. I have been well respected in the community socially, professionally, and in business and along with my husband have provided a good service in the public interest. He also has been honest in his endeavor and I know has true credibility or I would not have stayed involved. We have been involved

together and as a small family and have done nothing to be scurrilous - only state the facts the way we believe and know they exist.

12. I am of the firm opinion that all members of our small family business have exerted integrity and have credibility.

13. I must conclude by stating that Carpenters' credibility has been degraded and challenged for statements the Carpenters believe to be factual and the true. However, United can be responsible for breaking, entering Carpenters' premises, yell, scream, steal Carpenters' radio equipment and receives what appears to be "blessings" by the Courts. Further, Mr. Lou Goldman, an FCC attorney can cuss, swear, use vulgar language, and go into a tyrant with the Carpenters in the presence of United's executives, et al., and appears to be condoned by the FCC or to whomever has received the complaint.

Respectfully submitted,

August 24, 1983

Miriam G. Carpenter

Miriam G. Carpenter, Partner
Carpenter Radio Company
607 W. High St.
Lima, OH 45801
(419) 223-0501

Before me a Notary Public, this 24th. day of August, 1983 appeared Miriam G. Carpenter who states the foregoing to be true to the best of her knowledge and belief.

Diana G. Dulebohn

Diana G. Dulebohn, Notary Public
State of Ohio
My Commission has no expiration date

AFFIDAVIT

State of Ohio)
ss:
County of Allen)

Clementina I. DePalma, first being duly sworn states the following:

1. I attended the hearings in FCC Docket 21256, held in Judge Light's court room, in Lima, Ohio. I, also was a witness in that hearing.

2. During the time I was on the witness stand I could smell alcohol which was evident that it was on the breath of Judge Conlin. His demeanor and appearance appeared to qualify the above opinion.

3. Further, affiant sayeth not.

May 14, 1984

Clementina I. DePalma

Clementian I. DePalma
2215 Reinell
Lima, OH 45801
(419) 331-5525

Before me, a Notary Public, appeared Clementina I. DePalma, this 14th day of May, 1984 and states the foregoing is true to the best of her knowledge and belief.

James M. Carpenter - Notary Public
State of Ohio - My Commission expires 5/20/84

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)
)
James M. Carpenter and Miriam G. Carpenter) DOCKET NO. 21256
d/b/a CARPENTER RADIO COMPANY)
)
)
Pursuant to Section 201(a) of the)
Communications Act of 1934, as amended)
for establishment of physical connection)
between its facilities and those of the)
United Telephone Company of Ohio)

State of Ohio)
ss:
County of Allen)

AFFIDAVIT

Edmund C. Gallenz, first being duly sworn states the following:

1. I was a witness and attended the hearing in FCC Docket 21256 which hearing was held in the Allen County Court House, in Lima, Ohio.

2. During my time on the witness stand the smell coming from the direction of the bench, reminded me of the odor of a distillery.

3. During this hearing I heard the United lawyer Carolyn Hill, call the Judge by his first name - "John".

Further, affiant sayeth not.

April 21, 1985

Edmund C. Gallenz
Edmund C. Gallenz
1010 W. High St.
Lima, OH 45801

Before me, a Notary Public, appeared Edmund C. Gallenz, this 21st day of April, 1985 and states the foregoing is true to the best of his knowledge and belief.

James M. Carpenter - Notary Public
State of Ohio - My Commission expires 5/20/89

To Whom This May Concern

The Administrative hearing of Carpenter's Claims against the United Telephone Co. held in Lima, Allen Co. Ohio _____ was the worst example of a Kangaroo Court and miscarriage of justice that I ever witnessed.

Judge Conlin(?) seemed to be in a stupor much of the time; dozed off and didn't seem to be able to understand nor comprehend plain good English; or was attempting to intimidate me, when I said "I do so swear" (repeatedly) when sworn to tell the truth.

Carpenter represented himself (pro se) yet was not permitted to enter or submit testimony, relevant and pertinent to the case; while four Lawyers representing United were given excessive leeway; and what one didn't think of another did.

Two young chapters supposedly representing FCC dared to question my qualifications to voice opinion that messages were garbled (scrambled) even though I studied Electronics, Radio and Telecommunication and graduated from several Technical Classes; and taught at Lowry Field, Denver Colo. Air Forces' Technical Training Command, Power Turrets, Bomb Sights Central Fire Control Sperry, Ford, Morton, G.E. International et al, Amplidynes, Selsyns, Solenoids, Hydraulics, Radio, Vacuum Tube & Solid State, during W.W. II.

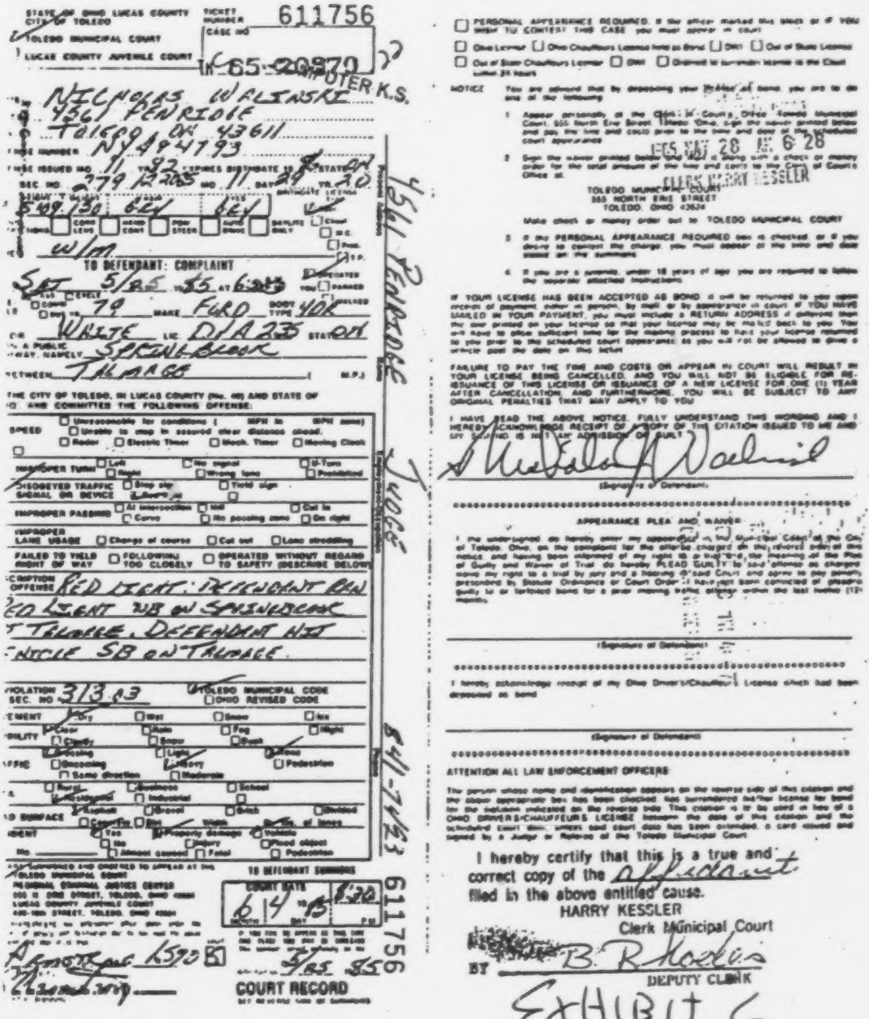
EXHIBIT 1

It wasn't FCC's place to help United but to be a disinterested, unbiased observer only; and they looked like a mouse seeking a hole to crawl into when I qualified myself, emphatically!

Carpenter is to be Congratulated, encouraged and helped for having sufficient Courage and tenacity to to fight for right and Justice but it seems that decent, innocent, law abiding, tax paying, producers get screwed in the Courts; while wrong doers, Criminals, are protected and rewarded!

Its time Victims receive a little Consideration and protection - IF there is any semblance of Justice remaining!!

Edmund C. Galleaz
May 3, 1985



STATE OF OHIO LUCAS COUNTY
CITY OF TOLEDO
✓ TOLEDO MUNICIPAL COURT
LUCAS COUNTY JUVENILE COURT

TICKET NUMBER 611756

CASE NO. ~~K-85-20870~~ ??
COMPUTER K.S.

NICHOLAS WALINSKI
4361 PENRIDGE
TOLEDO OH 43611

NUMBER NY494793

ISSUED MO. 11 YR. 82 EXPIRES BIRTHDATE 19 85 STATE OH
SEC. NO. 279 12 2085 MO. 11 DAY 29 YR. 20

540 150 6'2 BLK

W/M

TO DEFENDANT: COMPLAINT

SAT 5/25 85 AT 6:30 P.M.

79 MAKE FORD BODY TYPE 4DR
WHITE LIC. D/A 235 STATE OH
ON A PUBLIC HIGHWAY, NAMELY SPRINGBROOK
BETWEEN TALMAGE

THE CITY OF TOLEDO, IN LUCAS COUNTY (No. 48) AND STATE OF OHIO AND COMMITTED THE FOLLOWING OFFENSE:

SPEED ☐ Unreasonable for conditions (MPH in MPH zone) ☐ Unable to stop in assured clear distance ahead. ☐ Radar ☐ Electric Timer ☐ Mech. Timer ☐ Moving Clock

IMPROPER TURN ☐ Left ☐ Right ☐ No signal ☐ Wrong lane ☐ U-Turn ☐ Prohibited

✓ DISOBEYED TRAFFIC SIGNAL OR DEVICE ☐ Stop sign ☐ Yield sign

IMPROPER PASSING ☐ At intersection ☐ Hill ☐ Cut in ☐ Curve ☐ No passing zone ☐ On right

IMPROPER LANE USAGE ☐ Change of course ☐ Cut out ☐ Lane straddling

FAILED TO YIELD RIGHT OF WAY ☐ FOLLOWING TOO CLOSELY ☐ OPERATED WITHOUT REGARD TO SAFETY (DESCRIBE BELOW)

DESCRIPTION OF OFFENSE RED LIGHT: DEFENDANT RAN RED LIGHT NB ON SPRINGBROOK AT TALMAGE. DEFENDANT HIT VEHICLE SB ON TALMAGE.

VIOLATION SEC. NO. 313.03 ☑ TOLEDO MUNICIPAL CODE ☐ OHIO REVISED CODE

PAVEMENT ☑ Dry ☐ Wet ☐ Snow ☐ Ice

VISIBILITY ☑ Clear ☐ Rain ☐ Fog ☐ Night ☐ Cloudy ☐ Snow ☐ Dusk

TRAFFIC ☑ Crossing ☐ Oncoming ☐ Same direction ☐ Light ☑ Heavy ☐ Moderate ☑ None ☐ Pedestrian

AREA ☐ Rural ☑ Residential ☐ Business ☐ Industrial ☐ School

ROAD SURFACE ☑ Asphalt ☐ Gravel ☐ Brick ☐ Concrete ☐ Dirt ☐ Divided

ACCIDENT ☑ Yes ☐ No ☐ Almost caused ☑ Property damage ☐ Injury ☐ Fatal ☑ Vehicle ☐ Fixed object ☐ Pedestrian

ACC. No.

4361 PENRIDGE

JUDGE

541-7423

✓ SUMMONED AND ORDERED TO APPEAR AT THE TOLEDO MUNICIPAL COURT

TO DEFENDANT SUMMONS

COURT DATE 6 4 85 8:30

5/25 85

Armstrong 1590 81

COURT RECORD

☐ PERSONAL APPEARANCE REQUIRED. If the officer marked this block or if YOU WISH TO CONTEST THIS CASE you must appear in court.

☐ Ohio License ☐ Ohio Chauffeurs License held as Bond ☐ DWI ☐ Out of State License
☐ Out of State Chauffeurs License ☐ DWI ☐ Ordered to surrender license to the Court within 24 hours

NOTICE You are advised that by depositing your license as bond, you are to do one of the following:

1 Appear personally at the Clerk of Courts Office, Toledo Municipal Court, 555 North Erie Street, Toledo, Ohio, sign the waiver printed below and pay the fine and costs prior to the time and date of the scheduled court appearance.

2 Sign the waiver printed below and mail it along with a check or money order for the total amount of the fine and costs to the Clerk of Courts Office at:

TOLEDO MUNICIPAL COURT
555 NORTH ERIE STREET
TOLEDO, OHIO 43624

Make check or money order out to TOLEDO MUNICIPAL COURT

1985 MAY 28 AM 6 28
CLERK HARRY KESSLER

3 If the PERSONAL APPEARANCE REQUIRED box is checked, or if you desire to contest the charge, you must appear at the time and date stated on the summons.

4 If you are a juvenile, under 18 years of age, you are required to follow the separate attached instructions.

IF YOUR LICENSE HAS BEEN ACCEPTED AS BOND, it will be returned to you upon receipt of payment, either in person, by mail or by appearance in court. IF YOU HAVE MAILED IN YOUR PAYMENT, you must include a RETURN ADDRESS if different than the one printed on your license so that your license may be mailed back to you. You will have to allow sufficient time for the mailing process to have your license returned to you prior to the scheduled court appearance as you will not be allowed to drive a vehicle past the date on this ticket.

FAILURE TO PAY THE FINE AND COSTS OR APPEAR IN COURT WILL RESULT IN YOUR LICENSE BEING CANCELLED, AND YOU WILL NOT BE ELIGIBLE FOR REISSUANCE OF THIS LICENSE OR ISSUANCE OF A NEW LICENSE FOR ONE (1) YEAR AFTER CANCELLATION, AND FURTHERMORE, YOU WILL BE SUBJECT TO ANY ORIGINAL PENALTIES THAT MAY APPLY TO YOU.

I HAVE READ THE ABOVE NOTICE, FULLY UNDERSTAND THIS WORDING AND I HEREBY ACKNOWLEDGE RECEIPT OF A COPY OF THE CITATION ISSUED TO ME AND MY SIGNING IS NOT AN ADMISSION OF GUILT.

Nicholas A Walinski
(Signature of Defendant)

APPEARANCE PLEA AND WAIVER

I the undersigned do hereby enter my appearance in the Municipal Court of the City of Toledo, Ohio, on the complaint for the offense charged on the reverse side of this notice, and having been informed of my right to a trial and the meaning of the Plea of Guilty and Waiver of Trial do hereby PLEAD GUILTY to said offense as charged, waive my right to a trial by jury and a hearing in said Court, and agree to pay penalty prescribed by Statute, Ordinance or Court Order. I have not been convicted of, pleaded guilty to or forfeited bond for a prior moving traffic offense within the last twelve (12) months.

(Signature of Defendant)

I hereby acknowledge receipt of my Ohio Driver's/Chauffeur's License which had been deposited as bond.

(Signature of Defendant)

ATTENTION ALL LAW ENFORCEMENT OFFICERS

The person whose name and identification appears on the reverse side of this citation and the above appropriate box has been checked, has surrendered his/her license for bond for the violation indicated on the reverse side. This citation is to be used in lieu of a OHIO DRIVER'S-CHAUFFEUR'S LICENSE between the date of this citation and the scheduled court date, unless said court date has been extended, a card issued and signed by a Judge or Referee of the Toledo Municipal Court.

I hereby certify that this is a true and correct copy of the affidavit filed in the above entitled cause.
HARRY KESSLER
Clerk Municipal Court
BY B. Rhodes
DEPUTY CLERK

EXHIBIT 6

Docket No ______________ Page No ______________

Defendant's attorney ______________

Date	COURT ACTION ORDERS
	BAIL Note: Bail is not required in every case. Where issuance of the traffic ticket reasonably assures appearance there is no need for bail. Bail in the amount of $ ______ set/pursuant to bail schedule/by judge/ TYPE OF BAIL ☐ Defendant released upon personal recognizance ☐ Defendant released upon unsecured appearance bond in the amount of $ ______. ☐ Defendant released upon guaranteed arrest bond in the amount of $ ______. ☐ Defendant released upon cash bond in the amount of $ ______. ☐ Defendant released upon the deposit of securities allowed by law in the amount of $ ______. ☐ Defendant released upon the execution of a real estate bond as allowed by law in the amount of $ ______. ☐ Defendant released upon the surrender of driver's license ☐ Defendant released upon execution of surety bond in the amount of $ ______. ☐ Defendant released upon execution of appearance bond in the amount of $ ______ and the deposit in cash of the greater of ten percent of the face amount of the bond or twenty five dollars ☐ Other ______ ______ Signature of person taking bail
	VIOLATIONS BUREAU ACTION Plea of guilty, waiver of trial and fine in the amount of $ ______ and costs in the amount of $ ______ received ☐ Waiver by mail ☐ Waiver by personal appearance ______ Violations Clerk/Clerk/Deputy Clerk/
	Committed to ______ Reason ______
	Case called, def't failed to appear, bond forfeited ______
	Warrant/Summons/issued ______
	Warrant executed/Summons served/ ______
	Def't arraigned Plea ______ Jury demand filed ______ Set for trial ______ ______ Signature of judge
	Trial by/court/jury/ Finding/verdict/ ______ The court enters the following order: Fine $ ______ Costs $ ______ Jail ______ days in ______ Traffic School ______ Driver's License Suspended for ______ days Other Orders ______ ______ Signature of judge
	Notice of Appeal Filed ______ Conviction Report mailed to Bureau of Motor Vehicles ______ Subsequent Orders ______

ALCOHOL RELATED OFFENSE INFORMATION

Prior DWI Convictions	Prior Physical Control Convictions
	Deputy Clerk

Cir Court

OFFICER'S SUPPLEMENTAL COMMENTS:

The Officer's statement is incorporated in and made a part of this AFFIDAVIT.

5/31/85

50.00 + cost

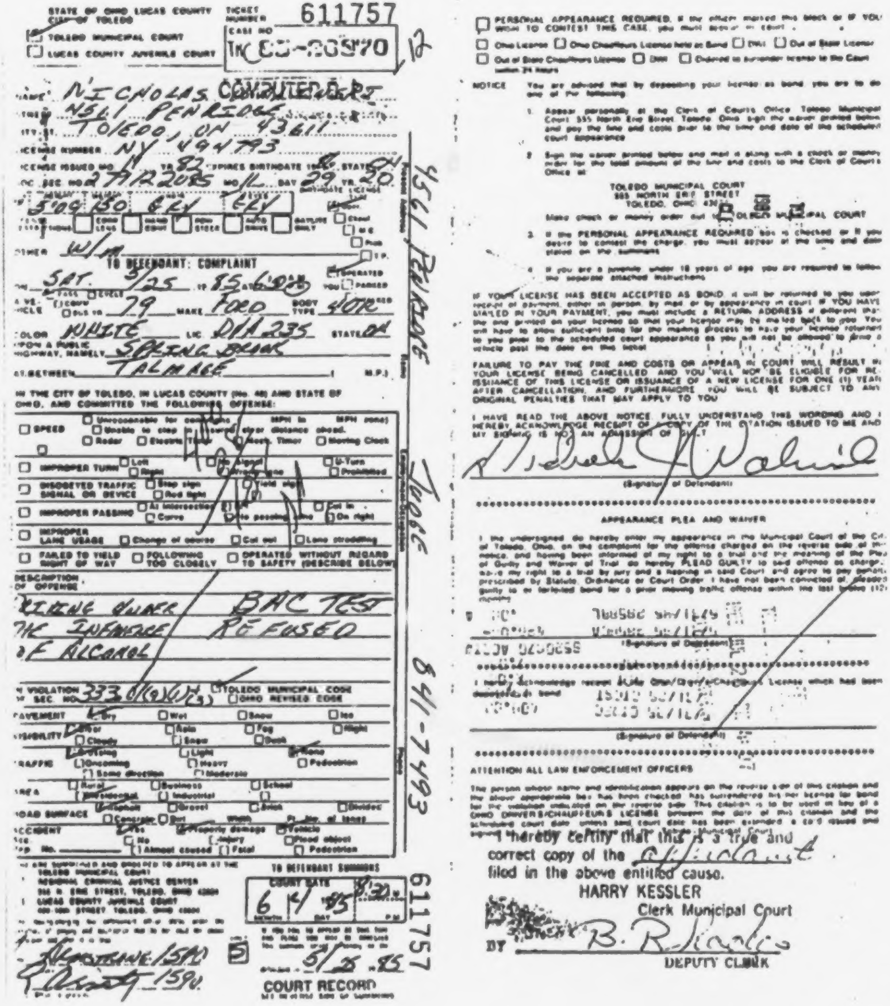
sentence susp

as included offense

COMPUTER K.S.

______ day of ______, 19 ____

______ OFFICER'S SIGNATURE



STATE OF OHIO LUCAS COUNTY
CITY OF TOLEDO
TICKET NUMBER 611757

☑ TOLEDO MUNICIPAL COURT
☐ LUCAS COUNTY JUVENILE COURT

CASE NO TK [illegible] 12

NAME NICHOLAS COMPUTED
STREET 4561 PENRIDGE
CITY, ST. TOLEDO, OH 43611
LICENSE NUMBER NY 494793
LICENSE ISSUED MO 11 YR 82 EXPIRES BIRTHDATE STATE OH
SOC SEC NO 277122085 MO 11 DAY 29 YR 20
5'09 150 GRY GRY
OTHER W/M

TO DEFENDANT: COMPLAINT

ON SAT. 3/25 19 85 AT 6:30 AM YOU ☑ OPERATED ☐ PARKED
A VEHICLE 79 MAKE FORD BODY TYPE 4DR
COLOR WHITE LIC. DVA 235 STATE OH
UPON A PUBLIC HIGHWAY, NAMELY SPRING BROOK
AT/BETWEEN TALMAGE (M.P.)

IN THE CITY OF TOLEDO, IN LUCAS COUNTY (No. 48) AND STATE OF OHIO, AND COMMITTED THE FOLLOWING OFFENSE:

☐ SPEED ☐ Unreasonable for conditions (MPH in MPH zone) ☐ Unable to stop in assured clear distance ahead. ☐ Radar ☐ Electric Timer ☐ Mech. Timer ☐ Moving Clock
☐ IMPROPER TURN ☐ Left ☐ Right ☐ No signal ☐ Wrong lane ☐ U-Turn ☐ Prohibited
☐ DISOBEYED TRAFFIC SIGNAL OR DEVICE ☐ Stop sign ☐ Red light ☐ Yield sign
☐ IMPROPER PASSING ☐ At intersection ☐ Curve ☐ No passing zone ☐ Cut in ☐ On right
☐ IMPROPER LANE USAGE ☐ Change of course ☐ Cut out ☐ Lane straddling
☐ FAILED TO YIELD RIGHT OF WAY ☐ FOLLOWING TOO CLOSELY ☐ OPERATED WITHOUT REGARD TO SAFETY (DESCRIBE BELOW)

DESCRIPTION OF OFFENSE
RIVING UNDER / BAC TEST
THE INFLUENCE / REFUSED
OF ALCOHOL

IN VIOLATION OF SEC. NO. 333.01(a)(1)(3) ☑ TOLEDO MUNICIPAL CODE ☐ OHIO REVISED CODE
PAVEMENT ☑ Dry ☐ Wet ☐ Snow ☐ Ice
VISIBILITY ☑ Clear ☐ Cloudy ☐ Rain ☐ Snow ☐ Fog ☐ Dusk ☐ Night
TRAFFIC ☑ Crossing ☐ Oncoming ☐ Same direction ☐ Light ☐ Heavy ☐ Moderate ☑ None ☐ Pedestrian
AREA ☐ Rural ☑ Residential ☐ Business ☐ Industrial ☐ School
ROAD SURFACE ☑ Asphalt ☐ Concrete ☐ Gravel ☐ Dirt ☐ Brick ☐ Divided Width Ft. No. of lanes
ACCIDENT ☐ Yes ☐ No ☐ Almost caused ☐ Property damage ☐ Injury ☐ Fatal ☐ Vehicle ☐ Fixed object ☐ Pedestrian

4561 Penridge Toledo 841-7493

YOU ARE SUMMONED AND ORDERED TO APPEAR AT THE
TOLEDO MUNICIPAL COURT
REGIONAL CRIMINAL JUSTICE CENTER
555 N. ERIE STREET, TOLEDO, OHIO 43604
LUCAS COUNTY JUVENILE COURT
TOLEDO, OHIO

1540
1590

TO DEFENDANT SUMMONS
COURT DATE 6/4/85 8:30 A.M.
MONTH DAY

5/25/85
COURT RECORD
611757

☐ PERSONAL APPEARANCE REQUIRED. If the officer marked this block or IF YOU WISH TO CONTEST THIS CASE, you must appear in court.
☐ Ohio License ☐ Ohio Chauffeurs License held as Bond ☐ DWI ☐ Out of State License
☐ Out of State Chauffeurs License ☐ DWI ☐ Ordered to surrender license to the Court within 24 hours

NOTICE You are advised that by depositing your license as bond, you are to do one of the following:

1. Appear personally at the Clerk of Courts Office, Toledo Municipal Court, 555 North Erie Street, Toledo, Ohio, sign the waiver printed below and pay the fine and costs prior to the time and date of the scheduled court appearance.
2. Sign the waiver printed below and mail it along with a check or money order for the total amount of the fine and costs to the Clerk of Courts Office at:

TOLEDO MUNICIPAL COURT
555 NORTH ERIE STREET
TOLEDO, OHIO 43604

Make check or money order out to TOLEDO MUNICIPAL COURT

3. If the PERSONAL APPEARANCE REQUIRED box is checked or if you desire to contest the charge, you must appear at the time and date stated on the summons.
4. If you are a juvenile under 18 years of age, you are required to follow the separate attached instructions.

IF YOUR LICENSE HAS BEEN ACCEPTED AS BOND, it will be returned to you upon receipt of payment, either in person, by mail or by appearance in court. IF YOU HAVE MAILED IN YOUR PAYMENT, you must include a RETURN ADDRESS if different than the one printed on your license so that your license may be mailed back to you. You will have to allow sufficient time for the mailing process to have your license returned to you prior to the scheduled court appearance as you will not be allowed to drive a vehicle past the date on this ticket.

FAILURE TO PAY THE FINE AND COSTS OR APPEAR IN COURT WILL RESULT IN YOUR LICENSE BEING CANCELLED AND YOU WILL NOT BE ELIGIBLE FOR REISSUANCE OF THIS LICENSE OR ISSUANCE OF A NEW LICENSE FOR ONE (1) YEAR AFTER CANCELLATION, AND FURTHERMORE, YOU WILL BE SUBJECT TO ANY ORIGINAL PENALTIES THAT MAY APPLY TO YOU.

I HAVE READ THE ABOVE NOTICE, FULLY UNDERSTAND THE WORDING AND I HEREBY ACKNOWLEDGE RECEIPT OF A COPY OF THE CITATION ISSUED TO ME AND MY SIGNING IS NOT AN ADMISSION OF GUILT.

Nicholas J Walcin
(Signature of Defendant)

APPEARANCE PLEA AND WAIVER

I, the undersigned, do hereby enter my appearance in the Municipal Court of the City of Toledo, Ohio, on the complaint for the offense charged on the reverse side of this notice, and having been informed of my right to a trial and the meaning of the Plea of Guilty and Waiver of Trial, do hereby PLEAD GUILTY to said offense as charged, waive my right to a trial by jury and a hearing in said Court and agree to pay penalty prescribed by Statute, Ordinance or Court Order. I have not been convicted of, pleaded guilty to or forfeited bond for a prior moving traffic offense within the last twelve (12) months.

(Signature of Defendant)

I hereby acknowledge receipt of my Ohio/Drivers/Chauffeurs License which had been deposited as bond.

(Signature of Defendant)

ATTENTION ALL LAW ENFORCEMENT OFFICERS

The person whose name and identification appears on the reverse side of this citation and the above appropriate box has been checked has surrendered his/her license for bond for the violation indicated on the reverse side. This citation is to be used in lieu of a OHIO DRIVERS/CHAUFFEURS LICENSE between the date of this citation and the scheduled court date unless said court date has been extended, a card issued and signed by the Clerk of the Toledo Municipal Court.

I hereby certify that this is a true and correct copy of the affidavit filed in the above entitled cause.
HARRY KESSLER
Clerk Municipal Court
BY B. R. [illegible]
DEPUTY CLERK

Docket No ____________ Page No ____________

Defendant's attorney ____________

Date	COURT ACTION ORDERS
	BAIL Note: Bail is not required in every case. Where issuance of the traffic ticket reasonably assures appearance there is no need for bail. Bail in the amount of $ ________ set/pursuant to bail schedule/by judge/ TYPE OF BAIL ☐ Defendant released upon personal recognizance ☐ Defendant released upon unsecured appearance bond in the amount of $ ________ ☐ Defendant released upon guaranteed arrest bond in the amount of $ ________ ☐ Defendant released upon cash bond in the amount of $ ________ ☐ Defendant released upon the deposit of securities allowed by law in the amount of $ ________ ☐ Defendant released upon the execution of a real estate bond as allowed by law in the amount of $ ________ ☐ Defendant released upon the surrender of driver's license ☐ Defendant released upon execution of surety bond in the amount of $ ________ ☐ Defendant released upon execution of appearance bond in the amount of $ ________ and the deposit in cash of the greater of ten percent of the face amount of the bond or twenty five dollars ☐ Other ________ Signature of person taking bail
	VIOLATIONS BUREAU ACTION Plea of guilty, waiver of trial and fine in the amount of $ ________ and costs in the amount of $ ________ received ☐ Waiver by mail ☐ Waiver by personal appearance Violations Clerk Clerk-Deputy Clerk
	Continued to ________ Reason ________
	Case called, def't failed to appear, bond forfeited ________
	Warrant/Summons issued ________
	Warrant executed/Summons served/ ________
	Def't arraigned Plea ________ Jury demand filed ________ Set for trial ________ Signature of judge
	Trial by/court/jury/ finding/verdict/ ________ The court enters the following order Fine $ ________ Costs $ ________ Jail ________ days in ________ Traffic School ________ Driver's License Suspended for ________ days Other Orders ________ Signature of judge
	Notice of Appeal Filed ________ Conviction Report mailed to Bureau of Motor Vehicles 6-5-85 Subsequent Orders Lic held

ALCOHOL RELATED OFFENSE INFORMATION

Prior DWI Convictions	Prior Physical Control Convictions
1-15-84	
	Deputy Clerk

Alcohol test available

OFFICER'S SUPPLEMENTAL COMMENTS:

The Officer's statement is incorporated in and made a part of this AFFIDAVIT.

SIR,
ON THE DATE + TIME STATED, DEFENDANT WAS INVOLVED IN ACCIDENT AT THE INTERSECTION OF SPRINGBROOK + TALMAGE. IN THE PROCESS OF TALKING WITH DEFENDANT HE SMELLED STRONGLY OF INTOXICANTS. DEFENDANT WAS TRANSPORTED BY AMBULANCE TO TOLEDO HOSPITAL WHERE HE REFUSE THE BLOOD ALCOHOL TEST.

RESPECTFULLY

5/31/85 — Affidavit of Eric Wesley of Toledo Hospital Alcoholism Treatment presented —

25 day of MAY 19 85

OFFICER'S SIGNATURE

5/31/85 NCF&
10 days $400.00 + costs
license for 5 yrs —
Def to be credit for the days in custody which confined to Hazelden — Center City Minn by the 27 Day program
this sent imposed [illegible]
COMPUTER B. P.
Opers — $535.33 —

Carpenter

AP--() OHIO --()

(MORE OHIO MIDDAY SPECIAL)

(WALINSKI-DWI)

(TOLEDO) -- TOLEDO FEDERAL JUDGE NICHOLAS WALINSKI IS TO ENTER AN ALCOHOL TREATMENT PROGRAM THIS WEEK FOLLOWING HIS SECOND DRUNKEN DRIVING ARREST IN A YEAR-AND-A-HALF. WALINSKI -- WHO WAS CONVICTED OF DRUNK DRIVING IN JANUARY OF 1984 -- WAS ARRESTED SATURDAY ON D-W-I CHARGES. POLICE SAY HIS CAR RAN A RED LIGHT AND STRUCK A CAR. THE 64-YEAR-OLD JUDGE DOESN'T PLAN TO STEP DOWN FROM THE BENCH, BUT SAYS HE DOES EXPECT A REPRIMAND FROM HIS PEERS. HE SAYS HE'LL ENTER A DETOXIFICATION CENTER IN MINNESOTA FOR A 28-DAY PROGRAM. HE WILL PAY FOR THE PROGRAM AND USE VACATION TIME FOR THE DAYS OFF.

IF CONVICTED OF THE SECOND CHARGE, THE JUDGE WOULD FACE A MANDATORY MINIMUM SENTENCE OF TEN DAYS IN JAIL; A LICENSE SUSPENSION OF UP TO FIVE YEARS AN A FINE UP TO ONE THOUSAND DOLLARS. HE SPENT THREE DAYS IN THE TOLEDO WORKHOUSE LAST YEAR.

AFFIDAVIT

State of Ohio)
ss:
County of Allen)

I, Clementina I. DePalma, first being cautioned and duly sworn, says that my son employed in his law office, as a secretary, one Bobbie Sue Wischmeyer.

Affiant further says, that Bobbie Sue Wischmeyer, told me that her son, Scott, was a personal friend of Judge Robert M. Light's daughter, Jody, and that her son had told her that Judge Light beat both Jody and her mother.

Affiant further says, that Bobbie Sue Wischmeyer, also said that Mrs. Light had gone to "Battered Women" for help, but they refused to do anything about these beatings of his wife and daughter, because Judge Robert M. Light, was a Judge of the Common Pleas Court of Allen County, Ohio.

Affiant further says, that Bobbie Sue Wischmeyer, was charged by the Grand Jury, with theft, Extortion, et al., against my son Philip N. DePalma, and that Judge Robert M. Light appointed Joseph C. DaPore, Esq., one of the top criminal lawyers in the state of Ohio, to defend her.

Affiant further says, that it is my personal belief the record of Bobbie Sue Wischmeyer, is such, that she accused my son of things, and wrote a 38 page complaint to the bar to intimidate my son.

Affiant further says, that it is my personal belief that this is Bobbie Sue Wischmeyer's personality pattern, to do an act and then accuse someone of another act to intimidate them.

Affiant further says, that it is my opinion, that this is the reason Judge Robert M. Light appointed Criminal Attorney Joseph C. DaPore, to the Bobbie Sue Wishmeyer's case, for she knew about the treatment, described above and intimidated Judge Robert M. Light, into that appointment, of Joseph C. DaPore Esq., who does not take Court Appointed cases.

Affiant further states, that following the appointment of Joseph C. DaPore, the case was turned over to Judge Michael A. Rumer's Court.

FURTHER, Affiant sayeth not:

Clementina I. DePalma

Clementina I. DePalma
2215 Reinell Ave.
Lima, OH 45801
(419) 331-5525

Before me a notary public, this 22nd day of February, 1982, personally appeared Clementina I. DePalma, who first being duly swore, says that the foregoing is the truth to the best of her knowledge and belief.

JAMES M. CARPENTER, JR.,
Notary Public, State of Ohio,
My Commission Expires 1985 January 9

Notary Public

EXHIBIT A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1621 September Term, 1981

MCI Telecommunications Corporation,
Petitioner

v.

Federal Communications Commission
and United States of America,
Respondents

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 3 1981

GEORGE A. FISHER
CLERK

Southern Pacific Communications Company,
United Telephone Company of Florida, et al.,
United States Transmission Systems, Inc.,
James M. Miriam G. Carpenter, etc.,
Intervenors

BEFORE: Robb and Wald, Circuit Judges

O R D E R

The necessity for recusal has only recently come to the attention of a member of this panel. Accordingly, it is

ORDERED by the Court, *sua sponte*, that the order of July 28, 1981, be, and the same hereby is, vacated.

The motion to dismiss and the motion to censure and suspend parties will be considered by the Court *de novo*.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, Clerk

BY: Robert A Bonner
Robert A. Bonner
Chief Deputy Clerk

The CHAIRMAN. Thank you very much. We appreciate your appearance.

Now, the next witness is Mr. Kenneth F. Collier. Is he here?

If you will hold up your hand and be sworn.

Will your testimony given in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. COLLIER. I do.

The CHAIRMAN. Mr. Collier, you have 3 minutes.

TESTIMONY OF KENNETH F. COLLIER, WASHINGTON, DC

Mr. COLLIER. I would like my statement submitted to the record as written, and I would like to address you directly related to what it is describing.

The issue of the integrity of the nominee has been questioned in the statement which the committee has been given. And that statement has been distilled from 4 hours of testimony which investigative reporters from the Dade County Home News in Florida submitted to the Federal Bureau of Investigation earlier this month, within 6 weeks ago.

It is a serious claim that Judge Scalia actually created a counterfeit concurrence—and a concurrence is a document which is used in order to express a concurring view with a slightly different twist. And in a very important case that is cited in this document and in the Federal District Court and in a case in the Superior Court of the District of Columbia, Judge Scalia is charged with having utilized this concurrence to virtually fix a case for the Republican National Committee.

Now, these are serious charges, and we are aware of the gravity of such a charge. But the paper work has been submitted to your staff, Senator Thurmond, Jack Mitchell in particular, and the FBI report and the statements in full in a good 4-hour debriefing of this matter so it wouldn't be held in 3 minutes and some mud slung and some charges made.

But instead there have been 6 weeks for these charges to be evaluated and, in addition, in order to test them on their merits, a lawsuit was instituted against Judge Scalia as soon as it was found out that he was up for this nomination, in order to test in the Federal Court of the District Columbia—it's right now in front of a judge who has been assigned to it at random—I won't mention his name, it's not important at this point. And this lawsuit against Judge Scalia directly challenges his integrity and the reasoning that was used and the cronyism and the tampering of records that was implicit in his deliberate concocting of a so-called concurrence, which was nothing but a counterfeit which served to derail several cases in the courts below, all of which cases involved personal close associates and friends of Judge Scalia's, and also certain other judges who ruled in the courts below, utilizing that concurrence in a most unfavorable manner in view of the posture of those cases, were also former colleagues of 13 years' duration in one case with Judge Scalia.

And so we can see why these lower court judges, particularly in the Superior Court of the District of Columbia—I see my time is up.

The CHAIRMAN. Do you want 2 more minutes?

Mr. COLLIER. I'd accept that, yes, sir. Philosophically, we will say this—I'm an investigative reporter, I'm not perfect—no one is perfect—these hearings here are not to test anything but deliberate questions as to whether or not this nominee in this time, in this place, is going to be challenged as we did this afternoon in order to come to these hearings—I was hoping that one question alone would be asked, and I called up the attorney for Judge Scalia, who is an Assistant U.S. Attorney in the Justice Department defending him against the lawsuit, and I said to her would you kindly, prior to the time when I have to testify, see if you can reach your client and tell him that we are going to be stating that as of now, since 6 weeks has elapsed since the filing of the suit—it's had a chance to mature—and this maturity, Senator Thurmond, has resulted in not a denial on the merits of the suit, which attacked the integrity of Judge Scalia to the utmost and put him as a codefendant with the Republican National Committee, but the answer instead went to a procedural thing, such as he has immunity to do whatever he did do, and if he didn't file the concurrence and it was the only concurrence that was never filed in the history of the appeals court, so be it.

This kind of behavior should be noted at this time. We felt constrained to come to the committee, because we saw what happened when Mr. Brosnahan failed to do so in years past, and now his credibility, which I have no knowledge of, is being questioned–and they are saying why didn't you come to us when it first was done? This is going to be in the record.

And if Judge Scalia had only replied to these charges by not having his attorney state the absolute truth, which she is correct, that there is no requirement for a judicial officer to submit—may I have 1 more minute, sir, and I will be very concise on what she told me.

The CHAIRMAN. Well, if you take 1 more minute.

Mr. COLLIER. Yes, I will, sir.

The CHAIRMAN. And that will give you twice as much as the other witnesses.

Mr. COLLIER. Thank you, sir. The attorney for Judge Scalia told me that he was going to plead—that she had discussed it with him, and that he is going to plead procedural defenses to these specific charges. All he needs to do is say did he know Henry E. Peterson back in the days of 1972 through 1974, and did he know Craig C. Donsanto, a material witness in one of the cases that was dismissed and derailed because of the counterfeit concurrence. And why didn't he take himself off the case. And all of those fundamental questions which go to these things.

Now, in the face of these hearings we anticipate that his answers will be forthcoming, and we look forward to those in court. And I'm sure that this committee also does.

Thank you, sir.

[Prepared statement follows:]

STATEMENT OF KENNETH F. COLLINS
AUGUST 6, 1986, SENATE JUDICIARY COMMITTEE

SENATORS OF THE UNITED STATES JUDICIARY COMMITTEE. I AM HERE AS SPOKESMAN FOR MY COLLEAGUES ON THE Home News OF DADE COUNTY, FLORIDA, TO TELL YOU ABOUT, AND TO LODGE A FORMAL COMPLAINT AGAINST THIS NOMINEE WHICH OUR NEWSPAPER HAS BEEN INVESTIGATING FOR NEARLY A YEAR. WE STARTED THE INVESTIGATION IN RESPONSE AND REACTION TO WHAT CAN ONLY BE DEEMED JUDGE SCALIA'S "BIZARRE BEHAVIOR" AS IT RELATES TO HIS DOCUMENTED INVOLVEMENT IN SUB-ROSA, OFF THE BENCH DEALINGS TO CORRUPTLY INFLUENCE THREE MULTI-MILLION DOLLAR CIVIL CASES PENDING IN THREE SEPARATE COURTS IN THE DISTRICT OF COLUMBIA IN THE YEAR 1985. ONE OF THOSE CASES INVOLVED THE Republican National Committee AS PARTY DEFENDANTS. WE REALIZE THAT SUCH CHARGES ARE EXTREMELY SERIOUS, HOWEVER THE DOCUMENTATION AND RECORD WE RELY ON TO SUPPORT THEM IS BOTH COMPELLING AND CONCLUSIVE.

THE KEYSTONE DOCUMENT EMBODYING THE WRONGDOING IS A DOCUMENT UNFORTUNATELY ENTERED INTO THE COURT SYSTEM BY JUDGE SCALIA HIMSELF WHEN HE ACTED WITHOUT JURISDICTION TO CAUSE TO COME INTO EXISTENCE A "COUNTERFEIT-CONCURRANCE" WHICH CONTAINED SELF-SERVING PREJUDICIAL LANGUAGE EXONERATING FRIENDS AND COLLEAGUES WHO HAD BEEN PARTY-DEFENDANTS IN THE THREE CASES, CAUSING LOWER COURT JUDGES TO TAKE JUDICIAL NOTE OF THE TAINTED DOCUMENT AND TO SUMMARILY DISMISS THOSE CASES, AT LEAST ONE OF WHICH WAS POISED ON THE EVE OF TRIAL. THE TAINTED MEMO WAS NEVER FILED OR DOCKETED AND HAD NO ORCE OF LAW. THE "COUNTERFEIT CONCURRANCE" WAS USED IN THE FOLLOWING MANNER:

A FORMER PRESIDENT OF THE DISTRICT OF COLUMBIA BAR ASSOCIATION, AN INDEPENDENTLY-HIRED DEFENSE COUNSEL FOR THE REPUBLICAN NATIONAL COMMITTEE, SEIZED UPON THE COUNTERFEIT CONCURRANCE AND PROMPTLY INTRODUCED THE MEMO INTO ILLEGALLY-FILED PLEADINGS IN D.C. SUPERIOR COURT,(VIOLATING LOCAL RULE 12-I/n.) THE DOCUMENT's EXISTENCE FORMED THE RATIONALE WHICH EASILY PERSUADED SUPERIOR COURT JUDGE HENRY F. GREENE TO WRONGFULLY CONVENE AN UNDOCUMENTED, UNCALENDARED, COUNTERFEIT "HEARING" LAST JANUARY, HELD IN A NEVER-OFFICIALLY-UTILIZED "MOOT COURTROOM" LOCATED OUTSIDE THE MAIN COURTHOUSE WHERE THE "STING" WAS COMPLETED AND THE FORMERLY-ROBUST BREACH-OF-CONTRACT LAWSUIT WAS DISMISSED OUT-OF-HAND.

THE RESULTS OF THE HOME NEWS INVESTIGATION INTO THAT INCIDENT HAVE GIVEN US REASON TO BELIEVE THAT JUDGE SCALIA KNOWINGLY VIOLATED EVERY PRECEPT OF THE CANON OF JUDICIAL ETHICS IN HIS SECRET CAMPAIGN TO FIX THE RNC CASE AND OTHERS RELATED TO IT IN U.S. DISTRICT COURT, IN ORDER TO PROTECT AND TO CURRY FAVOR WITH INFLUENTIAL FRIENDS AT THE RNC AND LONG-TERM ASSOCIATES IN THE UNITED STATES DEPARTMENT OF JUSTICE, PARTY-DEFENDANTS IN THOSE SUITS (RELATING TO THE REPUBLICAN NATIONAL COMMITTEE'S 1982-84 "BALLOT-SECURITY" PROGRAM REWARD-OFFER FOR ADMISSIBLE VOTE-FRAUD EVIDENCE) AND THEREBY TO GAIN [illegible] TO [illegible] THIS [illegible] NOMINATION

The CHAIRMAN. Thank you very much. I believe you are the last witness, and this winds up the hearing. We will excuse you now. Thank you.

Mr. COLLIER. Thank you.

The CHAIRMAN. We will keep the record open until 4 o'clock Friday afternoon in case any other statements are to come in by Senators or statements that are supposed to be admitted.

We want to thank all the witnesses for their appearance, we appreciate their being here, and the committee will take the matter under consideration.

There is a vote scheduled on this nomination on August 14, for Justice Rehnquist, and also Judge Scalia. And at that time the committee will vote, and then the matter will go over until it is acted on by the Senate.

We appreciate the presence of those who are here, and now stand adjourned.

[The committee adjourned at 5:25 p.m.]

[Responses of Judge Scalia to written questions from Senator Levin:]

CARL LEVIN
MICHIGAN

United States Senate
WASHINGTON, D.C. 20510

July 29, 1986

The Honorable Antonin Scalia
United States Court of Appeals
District of Columbia Judicial Circuit
Washington, DC 20001

Dear Judge Scalia:

I would appreciate a response to the following question relative to your nomination to become a Supreme Court Justice.

An article which appeared in the *Washington Post* on June 22, 1986, discussed your participation in *Western Union Telegraph Co. v. FCC*, a case that came before the D.C. Court of Appeals in October, 1985. Three years earlier, you had performed consulting services for one of the litigants in this case, AT&T. Therefore, you faced the question of whether your prior connection with AT&T would bring your impartiality into doubt. You eventually decided not to disqualify yourself from hearing this case.

In the *Post* article, a law clerk speaking for you was quoted as saying that you had checked with Chief Judge Spottswood W. Robinson III "to make sure that three years was an adequate time period." I would like to know whether you did consult with Chief Judge Robinson on the question of disqualifying yourself from *Western Union Telegraph Co. v. FCC*. If so, what advice did he give you?

Thank you for taking the time to respond to this question. Your response will be helpful to me as the Senate exercises its advise and consent duties with regard to your nomination. I would appreciate your answer by August 5, 1986.

Sincerely,

Carl Levin

cc: The Honorable Strom Thurmond
The Honorable Joseph Biden

United States Court of Appeals
District of Columbia Circuit
Washington, DC 20001

Antonin Scalia
United States Circuit Judge

1986 JUL 31 PM 4 33

July 30, 1986

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

As your office requested, I am addressing to you my response to the questions posed by Senator Levin in his letter of July 29.

I consulted Chief Judge Robinson on the question whether three years of disqualification from matters involving AT&T was sufficient to eliminate any appearance of impropriety arising from the fact that I had done consulting work for that company in the past. He advised me that in his view three years was ample.

I will be happy to provide any further information Senator Levin or the Committee might find helpful.

Sincerely,

Antonin Scalia

cc: The Honorable Carl Levin
The Honorable Joseph Biden

CARL LEVIN
MICHIGAN

United States Senate
WASHINGTON, D.C. 20510

August 15, 1986

The Honorable Antonin Scalia
United States Court of Appeals for
the District of Columbia
U.S. Courthouse
Third Street and Constitution Avenue, NW
Washington, DC 20001

Dear Judge Scalia:

I would appreciate your written response to the following question I have concerning your nomination process.

Did any employees of the Executive Branch or individuals at the request of employees of the Executive Branch ask you any questions about your position on issues that might come before the Supreme Court? If so, please list the issues mentioned, the persons who mentioned them and your answers.

Thank you for your prompt response to this request.

Sincerely,

Carl Levin

CL/ljp
cc: Senator Thurmond
Senator Biden

United States Court of Appeals
District of Columbia Circuit
Washington, DC 20001

Antonin Scalia
United States Circuit Judge

August 19, 1986

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

As your office requested, I am addressing to you my response to the question posed by Senator Levin in his letter of August 15.

In connection with my nomination, I have been asked no question by any Executive Branch employee concerning issues that might come before the Supreme Court, nor, to my knowledge, have I been asked any such question by any individual at the request of an Executive Branch employee.

I will be happy to provide any further information Senator Levin or the Committee might find helpful.

Sincerely,

Antonin Scalia

Antonin Scalia

cc: The Honorable Carl Levin
The Honorable Joseph Biden

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

CIRCUIT COURT OF COOK COUNTY

CHAMBERS OF
GERALD L. SBARBORO
JUDGE

CHICAGO, ILLINOIS 60602

SELECTION OF JUDGE SCALIA PRAISED;

Judge Gerald L. Sbarboro, Circuit Court of CookCounty, Illinois, Past National President of the American Justinian Society of Judges, a society composed of over 1200 judges of Italian descent from throughout the United States, today praised the nomination of Justice Antonin Scalia, as Associate Justice of the United States, stating that Judge Scalia is an excellent choice as he is known by his peers, the Judiciary, as not only an outstanding scholar, but also as a Judge of great competency and compassion.

Sbarboro further said of Judge Scalia's nomination: "I believe such an appointment will serve to illustrate to the millions of Americans of Italian derivation that in the United States the avenues of accomplishments available to this group of Americans and every group of Americans, is totally unlimited and that in this land they can progress as far as their talents can carry them."

Statement of Citizens for Educational Freedom
in Support of the Nomination of
Judge Antonin Scalia
to be
Associate Justice
# of the United States Supreme Court

Citizens for Educational Freedom applauds and strongly supports the nomination of Judge Antonin Scalia to be Associate Justice of the United States Supreme Court. We urge the Senate Judiciary Committee to expeditiously and favorably recommend Judge Scalia's confirmation by the United States Senate.

Citizens for Educational Freedom is a non-sectarian, non-partisan association committed to equal justice in education for every child. We believe that excellence in education is borne of diversity and competition. Founded in 1959, CEF is the national association of parents, administrators and teachers in all fifty states who support pluralism in education. We believe that parents, not the state, have primary rights in the education of children. In this regard, parents should have the right to choose religious or other private education without financial penalty or government interference. CEF works to secure tuition tax credits/deductions, seeks to repeal discriminatory state Blaine-type Amendments (laws in 36 states which prohibit tax monies from benefitting children in religious schools) and supports voucher proposals which would allow parents to target their education tax dollars to the schools of their choice.

CEF believes that Judge Scalia would bring to the Court a level of integrity, intellect, wisdom and experience which will enable him to be a truly great Justice of the United States Supreme Court.

Judge Scalia recognizes that religious and private schools make major contributions to the public good; contributions which are secular and of benefit to all of society. In a pluralistic society based on "liberty and justice for all" it is wrong to penalize those taxpayers who seek alternatives to government controlled schools. We gratefully remember that Judge Scalia was an early champion of the right of private and religious school parents to receive tax credits for the tuition they pay. Further, Judge Scalia has wisely recognized that the neutrality doctrine is incompatible with the free exercise clause in the first amendment. Indeed, the very existence of a free exercise clause indicates that the Constitution gives special favors to religion.

In summary, Citizens for Educational Freedom believes that the nation will be most fortunate to have Judge Antonin Scalia on the United States Supreme Court. We urge the Committee to recommend his speedy confirmation.

NATIONAL LAW ENFORCEMENT COUNCIL
Suite 804
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

Ordway P. Burden
Chairman

Donald Baldwin
Executive Director

Telephones: (202) 223-5598, 223-6850

July 28, 1986

The Honorable Strom Thurmond
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

Please submit for the record the enclosed statement of the National Law Enforcement Council in support of Associate Justice William H. Rehnquist, for Senate confirmation as Chief Justice of the United States Supreme Court.

This statement supporting Justice Rehnquist's nomination to Chief Justice of the Supreme Court is unanimously supported by the fourteen member organizations of the Council, representing over 300,000 law enforcement officers. The member national law enforcement organizations are listed in the attached statement.

Kindest regards,

~~Sincerely yours,~~

Donald Baldwin
Executive Director

Enclosure

REPRESENTING TWELVE NATIONAL LAW ENFORCEMENT ASSOCIATIONS WITH A COMBINED MEMBERSHIP OF OVER 300,000 LAW ENFORCEMENT OFFICERS

STATEMENT OF THE NATIONAL LAW ENFORCEMENT COUNCIL

Senator Thurmond, and Members of the Senate Judiciary Committee, the National Law Enforcement Council, an umbrella group representing, through their executive heads, fourteen national law enforcement organizations, wishes to be on record in favor of President Reagan's nomination of U.S. Supreme Court Associate Justice William H. Rehnquist for Chief Justice of the Supreme Court. We believe Judge Rehnquist's fifteen years as an Associate Justice of the Supreme Court, his experience as Assistant Attorney General of the United States, as an active and successful attorney in private pratice, and his experience as a law clerk to a Supreme Court Justice, give the nominee the extensive background and experience we look for in our Chief Justice.

Judge Rehnquist demonstrated early in life an outstanding ability to learn, understand, and apply the law. As a student, he always stood first in his class. This was true in his secondary school years where he stood out as an outstanding student. He graduated first in his class at Stanford Law School in 1952 after receiving his B.A. "with great distinction", earning him election into the highest academic fraternity, Phi Beta Kappa. He also earned advanced degrees from Stanford and Harvard Universities.

Few have ever attempted to question this man's intellectual ability, or his understanding of the law, its application to the rights of our citizens, and the meaning of our Constitution as it applies to the rights of every citizen to protection under the laws of our country.

As members of the law enforcement/criminal justice community sworn to provide protection for every citizen against violence and rights guaranteed by laws and the United States Constitution, we feel that Judge Rehnquist has demonstrated his ability to interpret and write his findings in legal cases to protect the citizens of this great land of ours. We believe that his high intelligence and demostrated knowledge of the beliefs of our founding fathers as we know them in our Constitution, will help advance the needs of our law enforcement community to be able to act quickly, when necessary, to protect our citizens against law breakers, and violence associated with those that do not believe in upholding our laws.

This statement is being made on behalf of the following national law enforcement criminal justice organizations who have given their unanimous approval for this statement to be submitted to the Senate Judiciary Committee on behalf of Judge Rehnquist to be Chief Justice of the United States Supreme Court.

Associations of Federal Investigators
Federal Criminal Investigators Association
FBI National Academy Associates
Fraternal Order of Police
International Union of Police Associations
Law Enforcement Assistance Foundation
National Association of Police Associations
National District Attorneys Associations
National Sheriffs' Association
National Troopers Coalition
Society of Former Special Agents of the FBI
Victims Assistance Legal Organization
International Association of Chief of Police
Airborne Law Enforcement Association

Aug 1, 1986
STATEMENT OF J. H. McQUISTON
on Nomination of Antonin Scalia
to the Supreme Court

McQuiston Associates
Los Angeles, California 90038

Mr Chairman and Members of the Committee:

McQuiston Associates is a "think tank" which is deeply involved with the Competition in Contracting Act (CICA) and the Equal Access to Justice Act (EAJA). Thus I have been analyzing the responses of many judges to important questions of policy generated therefrom, and have had to assess the extent to which the strong personal views of some judges have colored their opinions. Of particular concern has been how the personal views of a few strong-willed judges have actually caused major disruptions of the power-balance between the three Branches of government. "Judicial activism" we apply to foot-dragging as well as leaping ahead, if by so doing the will of Congressional statutes is thwarted in favor of the Executive.

Madison quoted Montesquieu, regarding the danger of a linkup between judges and the Executive:

> "Were [the power of judging] joined to the executive power, the judge might behave with all the violence of an oppressor." Federalist, No 47.

Because Art III prohibits federal judges from issuing advisory opinions, only rarely can we find out beforehand if the judge has a natural bias toward the Executive. But in a series of recent stinging attacks upon Congress, Judge Scalia leaves no doubt that his heart and head are entirely bound to the Executive and that he will use that loyalty in an "activist" manner if the situation presents itself. And in gratuitous remarks in Hirschey v FERC ("Hirschey III"), 777 F2d 1, 6 (1985), he counseled the Executive to act more aggressively against the relief which Congress just reenacted as P.L. 99-80.

Senator Levin said Nov 7, 1985, at S15038, that a federal judge must be compassionate, sensitive, committed to fairness, and forthright, to discharge properly the judicial duties. Nowhere are these qualities more necessary than for a Justice of the Supreme Court. I believe Hirschey III emphatically proves that Judge Scalia, betrothed to the Executive, simply does not measure up to the above standard and should not be elevated at this time.

Justice Rehnquist, in Walters v Natl Assn of Radiation Survivors, 53 LW 4947 (1985), quoted:

> "[C]ounsel can often perform useful functions * *. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty." Walters at 4953.

Such conduct of course would be reprehensible if practised by a judge. Yet, I submit that each of Judge Scalia's utterances in Hirschey III can only be classified as coming from a pseudo-counsel to the Executive. None can be reconciled with the kind of objectivity which Congress and the people of the United States expect their judges to exhibit. Certainly not a Justice of the Supreme Court.

Judge Scalia cannot plead ignorance of the Art III bar to spouting irrelevancies in judicial decisions. Yet the first paragraph of his comment in Hirschey III is devoted to saying that "the dictum discussed below" has no bearing on the outcome of the case.

Thereafter, he admits that the cost to recover Hirschey's expenses, no mean amount, exceeded the cost of litigating the case-in-chief, solely because the losing agency objected to compensation so vigorously. Even though Congress stated the policy of EAJA was to alleviate such disparate costs, and that Courts were to interpret EAJA liberally in favor of applicants so the recovery cost would not inhibit recovery, Scalia spontaneously exhorted the Executive to explore more "loopholes" next time, the better to frighten-off anyone else seeking the protection of this remedial legislation. His tight-fisted attitude cannot mark compassion, or sensitivity, or fairness for the downtrodden.

Even more clearly & presently dangerous to the Republic and the ability to get the Congressional mandates "faithfully executed" and enforced, he crusades in Hirschey III to reform the way in which the Judiciary has traditionally divined the intent of Congress. He would substitute his personal idea of the law for the explicit declarations set forth in official Congressional Reports (not to mention censoring floor debates). We would be at the mercy of judicial whim rather than abiding by the carefully-crafted thoughts of those Congress entrusted with various fine points.

Also, he proposed that ambiguities discovered or manufactured by courts could not be corrected by succeeding Congresses without entirely re-stating in statutory form the former language, even though the restaters possess the power to "repeal and re-enact" as they wish any prior statute at any time. In effect, he would give the power to legislate to the Judicial Branch and deny it to the Congress.

These astounding propositions are the hallmark of either an "airhead" or a judicial activist of the most dangerous kind: an anarchist. Judge Scalia proposed that judges should resolve questions of law in disregard of Congress:

> "not on the basis of what the committee report said, but on the basis of what we judged to be the most rational reconciliation of the relevant provisions of law Congress had adopted." Hirschey III at 8 (emphasis added)

Judge Scalia's attack on the way Congress is organized cannot stand against Art I Sec 5 Cl 2, which expressly permits each House to "determine the Rules of its Proceedings." But for him to mount such a divisive attack in the face of tradition, long-entrenched caselaw, and the Constitution, reveals perhaps the extent to which he is prepared to be the Executive's apologist and hatchet-man. Such a person would not help unite the badly-divided Supreme Court.

But there is even more of concern to Congress in Hirschey III. To "prove" his ridiculous propositions, Judge Scalia set forth a fragment of a debate on a tax bill to say that the Judiciary Committee of the other House was infantile. If such "proof" is how Judge Scalia influences the Judicial Branch, then surely Hirschey III stands for incompetence. But otherwise, this "proof" clearly stands for danger to our society.

Moreover, the citation at n.1 clearly distorts the actual debate and answer given by Senator Dole, as reference to the Record clearly shows. The actual Record refutes Judge Scalia completely. Nor is that debate even remotely illustrative of how Congressional intent is to be divined, in the eyes of other judges. Nor will the House debate on EAJA support Judge Scalia's wild claim.

I urge this Committee to examine carefully Judge Scalia's outburst in Hirschey III. I believe there is just no option thereafter for the members except to deny confirmation at this time.

McQuiston Associates
1035 North Orange Drive
Los Angeles, California 90038
(213) 464-6792; 463-1040

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

SYNOPSES OF REPORTED DECISIONS OF THE DISTRICT OF COLUMBIA CIRCUIT IN WHICH JUDGE ANTONIN GREGORY SCALIA AUTHORED A SIGNED OPINION OR OTHER STATEMENT

Paul L. Morgan
Legislative Attorney
August 12, 1986

SIGNED OPINIONS AUTHORED BY JUDGE SCALIA

CITATION	STYLE OF CASE	OPINION			LEGAL ISSUES INVOLVED IN CASE
		MAJ	CONC	DIS	
No. 84-1492 (July 29, 1986)	*Brock* v. *Cathedral Bluffs Shale Oil Co.*	x			Reversal and remand of Federal Mine Safety and Health Review Commission ruling which dismissed a safety violation fine. Commission improperly regarded Secretary of Labor's general statement of enforcement policy as a binding regulation which the Secretary was required to strictly observe.

SIGNED OPINIONS AUTHORED BY JUDGE SCALIA

CITATION	STYLE OF CASE	OPINION MAJ	OPINION CONC	OPINION DIS	LEGAL ISSUES INVOLVED IN CASE
No. 85-5887 (July 29, 1986)	Republic Airlines, Inc. v. United Airlines, Inc.	x			Affirming district court judgment on the pleadings against Republic for failure to state a claim. Agreement that Republic sought to enforce did not comply with federal regulations and was thus unenforceable as a matter of law.
No. 85-5249 (July 18, 1986)	Washington Post Co. v. United States Department of Health and Human Services	x			Reversal of district court decision affirming H.H.S. decision to withhold certain information requested under Freedom of Information Act. Issue was whether H.H.S. had raised the defense that the information was privileged in a timely fashion.
No. 85-1146 (June 24, 1986)	Regular Common Carrier Conference v. United States of America and Interstate Commerce Commission	x			Commission approval of certain tariff rules set aside as being contrary to law.
No. 85-1348 (June 20, 1986)	In re: Center for Auto Safety			x	National Highway Traffic Safety Administration repeatedly missed statutory deadline for promulgating fuel economy standards under the Energy Policy and Conservation Act. Court would retain jurisdiction until standards promulgated for 1989 model year. Case not moot.
No. 85-1231 (June 20, 1986)	Center for Auto Safety v. National Highway Traffic Safety Administration			x	Petitioner organizations have standing to bring suit in representative capacity for members who have suffered an injury-in-fact but the N.H.T.S.A. had authority under the Energy Policy and Conservation Act of 1975 to set fuel consumption standards for new vehicles within reasonable range.
No. 84-1292 (June 20, 1986)	National Treasury Employees Union v. Federal Labor Relations Authority	x			Remand of F.L.R.A. decision. Level of incentive pay awarded for performance of Agency work does not come within the nonbargainable management rights to assign work and direct employees as provided in the Civil Service Reform Act of 1978.
No. 84-5318 (June 18, 1986)	Block v. Meese	x			Upholds lawfulness under the Foreign Agents Registration Act and First Amendment of Justice Department's classification of three films as "political propaganda" and application of regulations requiring foreign agent's disclosure of names of certain recipients and exhibitors.
No. 85-5615 (June 17, 1986)	Conafay v. Wyeth Laboratories			x	Remand to district court with instructions to provide reasons for denying a motion to dismiss the action.
792 F.2d 241 (1986)	Internat'l Assoc. of Bridge, Structural, and Ornamental Iron Workers, AFL-CIO Local No. 111 v. N.L.R.B.	x			Question involving unfair labor practice by union local which attempted to discourage traveling union members from working within local's jurisdiction.
792 F.2d 194 (1986)	McKelvey v. Turnage		x	x	Question of whether the Veterans' Administration violated provision of Rehabilitation Act of 1973 by refusing to extend period of eligibility for veterans educational benefits for one seeking extension due to alcoholism. V.A. deemed such the veteran's own willful misconduct and would not extend. Affirmed.

SIGNED OPINIONS AUTHORED BY JUDGE SCALIA

CITATION	STYLE OF CASE	OPINION MAJ	OPINION CONC	OPINION DIS	LEGAL ISSUES INVOLVED IN CASE
792 F.2d 153 (1986)	Church of Scientology of California v. Internal Revenue Service	x			En banc decision defining meaning of so-called Haskell Amendment excepting from I.R.S. Code's definition of nondisclosable "return information" "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. §6103(b)(2) (1982)
732 F.2d 146 (1986)	Church of Scientology of California v. Internal Revenue Service	x			District Court's summary judgment in favor of I.R.S. vacated. I.R.S. had not sustained burden of proving that documents sought under a Freedom of Information Act request would "seriously impair federal tax administration."
791 F.2d 179 (1986)	In re Sealed Case	x			Interpretation of 18 U.S.C. 6002 (1982) relative to the extent immunity from prosecution would be granted under its provisions in a particular criminal investigation.
790 F.2d 938 (1986)	Aluminum Company of America v. United States	x			Shipper did not have standing to seek review of a determination that the I.C.C. lacked jurisdiction to consider a railroad's petition for review of interstate freight rates. I.C.C.'s assertion of original jurisdiction over the shipper was not final agency action and, thus, was not appealable.
790 F.2d 154 (1986)	Gates & Fox Co., Inc. v. O.S.H.R.C.	x			Regulation under which petitioner was cited for violating safety standards did not provide employer constitutionally adequate notice that it could be sanctioned for failing to provide rescue equipment to employees not working near advancing face of a tunnel or shaft.
788 F.2d 33 (1986)	Mathes v. Commissioner of Internal Revenue	x			Taxpayer excluded almost $60.000 from gross income on tax return. IRS determined that wages were taxable and taxpayer sought redetermination of deficiency. Tax Court did not abuse discretion in dismissing petition. Taxpayer subject to sanction of double costs and reasonable attorney fees-frivolous app
783 F.2d 1082 (1986)	United States v. Foster	x			En banc decision that a criminal defendant who, after denial of motion for judgment of acquittal at close of Government's case in chief, proceeds with presentation of his own case waives objection to the denial. Rule to be applied prospectively only.
783 F.2d 1072 (1986)	Rainbow Navigation, Inc. v. Department of the Navy	x			Affirming district court ruling that decision to revoke shipping preference on the ground that rates charged were excessive and otherwise unreasonable was not supported by evidence.
780 F.2d 59 (1985)	Northern Natural Gas Company, Division of Internorth, Inc. v. F.E.R.C.	x			Condition attached by Commission to a certificate of public convenience and necessity setting conditions after next rate case was not ripe for judicial review.
778 F.2d 8 (1985)	Road Sprinkler Fitters Local Union No. 669 v. National Labor Relations Board	x			Upholding decisions of the N.L.R.B. that a union had violated the National Labor Relations Act by causing employees to be fired or employment applicants not to be hired if not union members. Board lacked authority to provide remedy for unfair labor practice established by evidence but not charged in complaint

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CITATION	STYLE OF CASE	OPINION MAJ	OPINION CONC	OPINION DIS	LEGAL ISSUES INVOLVED IN CASE
777 F.2d 764 (1985)	ASARCO, Inc. v. F.E.R.C.	x			Petitions for review of F.E.R.C. order dismissed as the order reserved claims of petitioners for later disposition and was not reviewable. Also petitioner could not urge before the Court objection that other petitioners presented to F.E.R.C. but that petitioner itself did not.
777 F.2d 760 (1985)	Reynolds Metals Company v. F.E.R.C.	x			Major industrial customer of electric utility filed petitions for stay under All Writs Act and for stay pending review of F.E.R.C. order imposing on the utility, and hence its ratepayers, a 36% share of the costs of a nuclear plant. Petitions denied and dismissed. Order not final so petitions premature.
777 F.2d 751 (1985)	American Federation of Government Employees, AFL-CIO, Local 3090 v. Federal Labor Relations Authority		x		Decision of F.L.R.A. dismissing unfair labor practice complaint vacated and remanded. Case not moot. Long standing regulation provides that filing of exception does not operate as stay of decision so agency must comply with arbitrator's award.
777 F.2d 1 (1985)	Hirschey v. Federal Energy Regulatory Commission		x		Remand of 760 F.2d 305 (1985), infra. Consideration of petitioner's claims for award of attorney fees and costs under the Equal Access to Justice Act as prevailing party in action against F.E.R.C.
776 F.2d 355 (1985)	Illinois Commerce Commission v. Interstate Commerce Commission	x			Order of Inter. C.C. vacated in part and remanded. Question of amending regulations dealing with whether requested abandonment of railroad line should be granted and the amount of subsidy to be required to preclude abandonment.
775 F.2d 392 (1985)	Citizens for Jazz on WRVR, Inc. v. Federal Communications Commission	x			Remand to F.C.C.'s decision rejecting without a hearing a petition of a citizens group for denial of renewal of radio broadcasting license. Proper standard of evidence is whether question of fact placed in issue is "substantial" one and did not require establishment of "clear precise and indubitable" proof.
774 F.2d 1205 (1985); cert. den. 54 U.S.L.W. 3662 (1986)	City of Charlottesville, Virginia v. F.E.R.C.	x			Denial of city petition for review of F.E.R.C.'s decision to use "stand-alone" methodology to determine tax allowances included in costs of services and hence rates of two interstate natural gas pipelines which were part of consolidated group. Approach was reasonable and correct.
774 F.2d 490 (1985)	Electrical District No. 1 v. Federal Energy Regulatory Commission	x			Remand of order to F.E.R.C. Commission could not lawfully make rate increase effective as of date of its order directing compliance filing rather than upon date of acceptance of compliance filing.
773 F.2d 1368 (1985)	City of Cleveland, Ohio v. F.E.R.C.	x			Denying petition for review of order of F.E.R.C. accepting a compliance filing by electric utility. Procedures not contrary to law, arbitrary or capricious, or impermissibly vague.
773 F.2d 1325 (1985)	In Re the Reporters Committee For Freedom of the Press	x			Affirming district court decision allowing intervention in civil defamation action by group of reporters but denying group prejudgment access to trial documents under seal. No violation of First Amendment right of public access by sealing documents until entry of judgment where claim of confidentiality.

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CITATION	STYLE OF CASE	OPINION MAJ	OPINION CONC	OPINION DIS	LEGAL ISSUES INVOLVED IN CASE
773 F.2d 375 (1985)	Western Union Telegraph Co. v Federal Communications Commission	x			Court lacked jurisdiction over petition filed before F.C.C. order of which it sought review had been entered.
772 F.2d 979 (1985)	Las Misiones de Bejar Television Co. v. Federal Communications Commission	x			Statement of reasons to per curiam opinion allowing remand to enable F.C.C. to consider settlement between competing applicants for station license.
772 F.2d 951 (1985)	Fink v. National Savings and Trust Company		x	x	Affirming in part, vacating in part and remanding district court decision concerning employer-sponsored ERISA retirement beneficiaries suit against the plan's fiduciaries to enforce rights. Generally decided by application of master/servant law.
772 F.2d 940 (1985); cert. den. 54 U.S.L.W. 3578 (1986)	United States v. Hansen	x			Affirming conviction of former Congressman's willful filing of false statements in annual financial disclosure required by Ethics in Government Act. Rights under Speedy Trial Act not violated.
770 F.2d 1223 (1985)	National Association of Government Employees, Local R7-23 v. Federal Labor Relations Auth.	x			Affirming in part and remanding in part F.L.R.A. decision that agency did not interfere with statutorily guaranteed union rights in evaluating public employee's performance and in requesting employee to devote more time to job-related work.
770 F.2d 1220 (1985)	Dir. Office of Workers Compensation Programs v. Belcher Erectors	x			Reversal of decision of Benefits Review Board which had reversed an Administrative Law Judge's determination relative to a worker's not having a preexisting injury. ALJ's determination supported by substantial evidence.
770 F.2d 202 (1985)	Sanchez-Espinoza v. Reagan	x			Affirming district court dismissal of action against President and other federal officials alleging claims arising out of U.S. actions in Nicaragua. Alien Tort Statute inapplicable to private actions of executive officials. claims by Congressmen presented nonjusticiable political question.
768 F.2d 352 (1985)	FAIC Securities, Inc. v. United States	x			Affirming district court decision invalidating F.D.I.C. regulations as contravening applicable statutory requirements. Brokers had standing to maintain suit.
765 F.2d 1196 (1985); cert. gr., 54 U.S.L.W. 3575 (1986)	Securities Industry Association v. Comptroller of the Currency			x	Denial of petition for hearing en banc of 758 F.2d 739, infra.
762 F.2d 1119 (1985)	Department of the Treasury v. Federal Labor Relations Auth.	x			Order of F.L.R.A. was inconsistent with government-wide regulations requiring employment practices to be based on analyses of positions or occupations having common characteristics and thus unenforceable.

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CITATION	STYLE OF CASE	OPINION MAJ	OPINION CONC	OPINION DIS	LEGAL ISSUES INVOLVED IN CASE
762 F.2d 1044 (1985)	California Human Development Corporation v. Brock		x		Department of Labor's formula for allocating funds under the Job Training Partnership Act, based upon 1980 Census occupational data rather than social security data, conformed to the relevant statutes and agency's own regulations and therefore was valid.
761 F.2d 768 (1985)	Maryland People's Counsel v. F.E.R.C.	x			Petition granted to invalidate F.E.R.C. approval of experimental increase in natural gas pipeline competition. Commission failed to set forth a reasonable basis to show that amending certain contracts would benefit all pipeline rate payers.
761 F.2d 746 (1985)	Aluminum Co. of America v. I.C.C.	x			Denial of petitions of review of I.C.C. dismissal of complaint against railroad rates applicable to aluminum ingot. Railroads had properly established substantial product competition regarding the products in question.
760 F.2d 1297 (1985)	National Black Media Coalition v. F.C.C.	x			Limitation of statute governing time for filing notice of appeal from orders of F.C.C. is jurisdictional and alleged failure of F.C.C. to provide personal notice of its decision to parties did not operate to extend the otherwise applicable deadline.
760 F.2d 318 (1985)	Maryland People's Counsel v. F.E.R.C.	x			On petition for review of F.E.R.C. order authorizing natural gas special marketing programs, Petitioner had standing to challenge marketing programs.
760 F.2d 305 (1985)	Hirschey v. F.E.R.C.		x	x	Petitioner sought an award of attorney's fees and costs as a prevailing party in case against the Government arising out of the Federal Power Act. Barred by the Act;however, petitioner entitled to certain attorney's fees under Equal Access to Justice Act.
759 F.2d 936 (1985)	Radiofone, Inc. v. Federal Communications Commission	x			Dispute between competitors of radio paging service company, which went out of business while appeal was pending, and the F.C.C. regarding lawfulness of company's operations, was moot.
759 F.2d 185 (1985)	Trakas v. Quality Brands, Inc.			x	Reversal of district court dismissal of action with prejudice for want of prosecution. Dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success.
758 F.2d 739 (1985); cert. gr. 54 U.S.L.W. 3575 (1986)	Securities Industry Association v. Comptroller of the Currency		x	x	Affirming lower court .ruling reversing decision of Comptroller of the Currency. National Banks are not entitled to approval of applications for establishment or purchase of discount securities brokerage subsidiaries.
757 F.2d 296 (1985)	Simmons v.Interstate Commerce Commission	x			Decision by the I.C.C. to require annual reports filed by railroads to contain only such information "as needed by the Commission on a regular and frequent basis" and not information of use to the general public had legal support but decision was procedurally defective.

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CITATION	STYLE OF CASE	OPINION			LEGAL ISSUES INVOLVED IN CASE
		MAJ	CONC	DIS	
756 F.2d 902 (1985); rehear en banc gr, June 10, 1985, dism. Sep. 20, 1985	Gott v. Walters	x			Statute precludes judicial review of decisions of Administrator of Veterans' affairs on any question of law or fact.
756 F.2d 191 (1985)	Atlanta Gas Light Co. v. F.E.R.C.	x			Denial of petition for review of F.E.R.C. approval of gas company's curtailment plan. Plan consistent with Natural Gas Policy Act and with regulations of F.E.R.C.
756 F.2d 166 (1985); cert. den. 54 U.S.L.W. 3225 (1985)	Interstate Natural Gas Association of America v. F.E.R.C.			x	Order of F.E.R.C. was arbitrary and capricious where there was no explanation for the change from a prior order.
756 F.2d 91 (1985)	Beattie v. United States			x	Antarctica not "foreign country" within meaning of foreign country exception for Federal Tort Claims Act; venue proper in U.S. District Court for D.C.; D.C. law to be applied.
751 F.2d 1398 (1985)	Carter v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor	x			Granting employee's petition for review of Benefits Review Board denial of reinstatement of suspended benefits.
751 F.2d 1336 (1985)	Center for Auto Safety v. Peck	x			Petition to review action of National Highway Traffic Safety Administration reducing minimum performance standard for automobile bumpers denied. Agency action not arbitrary or capricious, was based on valid factors and there was no clear error of judgment.
750 F.2d 970 (1984); cert. den. 53 U.S.L.W. 3837 (1985)	Ollman v. Evans		x	x	Expressions of opinion by newspaper columnists were constitutionally protected.
749 F.2d 875 (1984); cert. den. 54 U.S.L.W. 3223 (1985)	Illinois Commerce Commission v. Interstate Commerce Commission			x	Staggers Rail Act reasonably interpreted by the Interstate C.C. and the Act provisions were facially constitutional.
749 F.2d 815 (1984)	Molerio v. F.B.I.	x			Affirming lower court dismissal. No discrimination in failure to hire plaintiff as special agent as he was not qualified for job because he could not obtain security clearance. No due process. first amendment questions.
749 F.2d 77 (1984)	Romero v. National Rifle Association of America, Inc.	x			Organization entitled to benefit of general rule of nonliability at common law for harm resulting from criminal acts of third parties with respect to its liability for death of robbery victim shot with gun taken during burglary. District court affirmed.

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CITATION	STYLE OF CASE	OPINION			LEGAL ISSUES INVOLVED IN CASE
		MAJ	CONC	DIS	
749 F.2d 58 (1984)	Shaw v. F.B.I.	x			Reversing lower court. Photographs of participants in a peace march constituted confidential information and were obtained in the course of an authorised investigation, thus were not required to be disclosed under the Freedom of Information Act.
749 F.2d 50 (1984)	Community Nutrition Institute v. Block	x			Affirming lower court dismissal of suit challenging Secretary of Agriculture's regulations involving labeling of meat products. Regulations did not permit sale of meat misbranded in violation of Federal Meat Inspection Act and were not issued in violation of the Administrative Procedure Act.
747 F.2d 787 (1984)	American Trucking Associations, Inc. v. I.C.C.	x			Dismissal of petition not ripe for adjudication. thus appropriate for dismissal on the court's own motion.
747 F.2d 781 (1984)	Transwestern Pipeline Co. v. F.E.R.C.	x			Petition to set aside declaratory order of Federal Energy Regulatory Commission dismissed as there was no "party aggrieved" and thus no federal jurisdiction.
747 F.2d 1 (1984)	Center for Auto Safety v. Ruckelshaus	x			Granted petition to review decision of Enviromental Protection Agency allowing auto manufacturers to remedy violations of emission control regulations by meeting stricter standards in future years. EPA's action not authorised by Clean Air Act.
746 F.2d 1563 (1984); rev. 54 U.S.L.W. 4755 (1986)	Liberty Lobby v. Anderson	x			Substantial fact issues existed as to whether certain allegations not based upon good-faith reliance on reputable sources were defamatory, false, and made with actual malice, precluding summary judgment in favor of publisher in district court.
746 F.2d 855 (1984); rev., 54 U.S.L.W. 4765 (1986)	International Union. United Auto.,Aerospace & Agricultural Implement Workers of America v. Donovan	x			Court of Appeals had no jurisdiction to review Secretary of Labor's decision, unrestricted by law, to allocate funds under the Trade Act of 1974.
745 F.2d 1500 (1984); remand, 53 U.S.L.W. 3824 (1985)	Ramirez de Arellano v. Weinberger			x	See: 724 F.2d 143 (1983) infra. En banc rehearing reversed earlier decision. Plaintiffs had justiciable cause of action and standing. Doctrine of equitable discretion might permit some form of injunction. Act of State doctrine does not bar relief.
745 F.2d 677 (1984)	Ass'n of Data Processing Service Organizations v. Board of Governors of the Federal Reserve System	x			Denial of petition for review of Federal Reserve order approving bank's application to establish subsidiary to engage in certain data processing and transmission services. Services were found "closely related to banking"thus authorized under Bank Holding Company Act.
744 F.2d 871 (1984)	City of Winnfield, LA v. F.E.R.C.	x			Denial of petition for review of order of Commission authorizing increased rate for an electric utility. Evidence supported increase.

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CITATION	STYLE OF CASE	OPINION			LEGAL ISSUES INVOLVED IN CASE
		MAJ	CONC	DIS	
744 F.2d 197 (1984)	Delta Data Systems Corp. v. Webster	x			Fashioning relief for a disappointed bidder due to FBI's violation of federal procurement regulations.
741 F.2d 401 (1984)	Thompson v. Clark	x			Affirmance of lower court's dismissal of developer's challenge of final rule promulgated by Secretary of Interior increasing application and rental fees for certain noncompetitive federal oil and gas leases. Judicial review precluded by Regulatory Flexibility Act.
740 F.2d 1104 (1984)	United States v. Byers	x			En banc holding that statements by defendant to court-appointed psychiatrist tending to negate insanity defense admissible despite contention that such violated right against self-incrimination. No right to counsel attaches to examination by court-appointed psychiatrist.
738 F.2d 1375 (1984)	United Presbyterian Church in the U.S.A. v. Reagan	x			Affirmance of trial court's dismissal of action for lack of standing. Challenge to Executive Order establishing framework for govermental and military intelligence gathering functions.
738 F.2d 1304 (1984)	de Perez v. F.C.C.	x			In granting instruction permit to potential competitor, the Commission's waiver of its rules regarding interference was not arbitrary or capricious, and the Commission did not impermissibly depart from its prescribed method of determining points of reference for communities.
737 F.2d 1173 (1984)	Poindexter v. F.B.I.		x	x	Reversal and remand of decision on granting plaintiff's request for appointment of an attorney in a Title VII employment discrimination action.
735 F.2d 1517 (1984); cert. den. 53 U.S.L.W. 3668 (1985)	Asociacion de Reclamentes v. United Mexican States	x			Affirming district court decision that action seeking compensation from Mexico for alleged taking and conversion of certain land grant related claims barred by Foreign Sovereign Immunities Act.
734 F.2d 1541 (1984)	South Carolina Electric & Gas Co. v. I.C.C.	x			Denial of utilities petition for review of ICC order directing railroads to restate the value of their assets when changing method of accounting. Order not ripe for judicial review when not calling into question primary conduct in which utilities engaged.
735 F.2d 946 (1984); cert. den. 53 U.S.L.W. 3483 (1985)	Moore v. U.S. House of Representatives		x		While members of House of Representatives had standing to bring action alleging violation of constitutional mandate that revenue-raising bills originate in the House, declaratory relief properly withheld by lower court due to separation of powers concerns.
733 F.2d 128 (1984)	United States v. Cohen	x			Affirming lower court order committing to hospital for the mentally ill one found not guilty by reason of insanity of possession of unregistered destructive devices. Procedures enacted by Congress for committment do not violate equal protection.

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CITATION	STYLE OF CASE	OPINION			LEGAL ISSUES INVOLVED IN CASE
		MAJ	CONC	DIS	
732 F.2d 213 (1984)	Devine v. Pastore	x			Granting Director of O.M.B.'s petition for review of order of arbitrator mitigating penalty of removal imposed by Customs Service against an inspector for theft of merchandise entrusted to him. Arbitrator erred in assessment of penalty to be imposed, misinterpreted the agreement and misapplied the law.
730 F.2d 799 (1984)	Bouchet v. National Urban League Inc.	x			Affirming Title VII employment discrimination suit decision in favor of employer, employee's supervisor and dismissal of a second complaint.
730 F.2d 790 (1984)	State of North Carolina v. F.E.R.C.	x			Denial of petition for review of F.E.R.C. order prescribing curtailment plan for interstate natural gas pipeline.
728 F.2d 1500 (1984)	Answering Service, Inc. v. Egan		x		Corporation action against former codefendant for wrongful involvement in litigation not barred by D.C. preclusion law.
728 F.2d 543 (1984)	Port Norris Express Co., Inc. v. Interstate Commerce Comm.	x			Petition of appeal of order of I.C.C. granting application for authority to transport general commodities in both bulk and non-bulk form denied.
727 F.2d 1225 (1984)	Carter v. Duncan-Huggins, Ltd.			x	Affirming judgment entered in favor of a discrimination plaintiff. Evidence below sufficient for jury to adduce that employer intentionally discriminated against the plaintiff and jury award of $10,000 not unreasonable.
727 F.2d 1145 (1984)	Tymshare, Inc. v. Covell	x			Interpretation of contract.
727 F.2d 1127 (1984)	New England Coalition on Nuclear Pollution v. N.R.C.	x			Remand of order of Nuclear Regulatory Commission amending Commission's rules of practice in certain proceedings and certain substantive requirements. Amendments not supported by statement of basis and purpose.
726 F.2d 832 (1984)	Air New Zealand Ltd. v. C.A.B.	x			Denial of petition of foreign air carrier for review of Civil Aeronautics Board order as not ripe for review.
724 F.2d 1030 (1984)	Chaney v. Heckler			x	Denial of en banc rehearing of 718 F.2d 1174 (1983), infra.

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CITATION	STYLE OF CASE	OPINION MAJ	OPINION CONC	OPINION DIS	LEGAL ISSUES INVOLVED IN CASE
724 F.2d 143 (1983); vacated, 745 F.2d 1500 (1984); vacated 53 U.S.L.W. 3824 (1985)	Ramirez de Arellano v. Weinberger	x			Allegations that the Secretary of Defense had wrongfully occupied plaintiffs' Honduran property was justiciable but injunctive relief inappropriate as it would intrude into foreign affairs, require continuing supervision of court in Honduras, question legality of Honduran officials action under their law.
723 F.2d 975 (1983); cert. den. 53 U.S.L.W. 3236 (1984)	Sea-Land Service, Inc. v. Dole	x			Secretary of Transportation not required to hold hearings prior to taking certain actions under the Merchant Marine Act of 1936.
723 F.2d 950 (1983); cert. den. 467 U.S. 1241 (1984)	Papago Tribal Utility Authority v. F.E.R.C.	x			Interpretation of contract between parties.
723 F.2d 82 (1983)	Kansas Cities v. F.E.R.C.	x			Denying petition for review of Commission order allowing increased electricity rates to be charged by supplier. Evidence sufficient to show that F.E.R.C. had acted within bounds of sound discretion.
720 F.2d 192 (1983)	Tavoulareas v. Comnas	x			Affirmed lower court dismissal of action for libel and slander.
718 F.2d 1174 (1983); rev. 53 U.S.L.W. 3532 (1985)	Chaney v. Heckler			x	Inmates under death sentence asserted that use of certain drugs for execution, without prior Food and Drug Administration approval violated provisions of federal law. FDA had jurisdiction to interfere with state gov. use of drugs for execution and had arbitrarily and capriciously refused to exercise jurisdic
718 F.2d 1170 (1983)	Dunning v. N.A.S.A.	x			Denial of petition of government employee for review decision of Merit Systems Protection Board affirming 15 day suspension imposed by N.A.S.A. Evidence supported propriety of suspension for insubordination and supported finding that action was not taken in reprisal for earlier challenge to procedures.
718 F.2d 1164 (1983)	City of Bedford v. F.E.R.C.	x			Denial of petition for review of Commission orders granting preliminary permits for preparation of license applications relative to hydroelectric facilities. Commission procedure reasonable.
718 F.2d 475 (1983)	Safir v. Dole	x			Upon complaint of former shipper bankrupted. in part by predatory pricing by certain carriers, the Secretary of Commerce directed recovery of some subsidies paid carriers. District judge modification of order vacated and remanded with order to dismiss. No jurisdiction due to lack of standing.
717 F.2d 1419 (1983), cert. den. 466 U.S. 937 (1984)	Ensign-Bickford Co. v. OSHRC			x	Affirmance of Commission finding that employer willfully violated the general duty clause of the Occupational Safety and Health Act. Clause not unconstitutionally vague and Act not preempted by Department of Defense safety manual on explosives manufacture.

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CITATION	STYLE OF CASE	OPINION MAJ.	OPINION CONC.	OPINION DIS.	LEGAL ISSUES INVOLVED IN CASE
717 F.2d 1402 (1983)	Steger v. Defense Investigative Service, Department of Defense			x	Merit System Protection Board decision denying public employee attorney fees expended in successfully challenging discharge from employment was arbitrary and capricious. Board should have considered whether agency had taken action knowing it would not prevail on the merits.
716 F.2d 40 (1983)	Simmons v. Interstate Commerce Commission	x			Rule review petition dismissed as petitioner not an "aggrieved party" under Hobbs Act and intervenor did not meet procedural requirements of Act in timely fashion.
715 F.2d 644 (1983)	Ryan v. B.A.T.F.	x			Affirming lower court's interpretation of Freedom of Information Act provision authorizing exemption from disclosure of certain information relative to protection of revenue.
715 F.2d 632 (1983)	Nat. Coalition to Ban Handguns v. B.A.T.F.	x			Gun Control Act of 1968 did not require that applicant for firearms dealers' license have "bona fide" commercial enterprise with separate business premises and significant commercial operations.
714 F.2d 171 (1983)	Carducci v. Regan	x			Reassignment of employee of Customs Service without reduction in pay or grade is discretionary personnel practice committed to agency by federal law and not subject to judicial review.
712 F.2d 1495 (1983)	International Brotherhood of Teamsters v. National Mediation Board	x			Agency possession of gummed address labels of employees eligible to vote in representative election was not control of labels so as to subject them to disclosure as agency records under the Freedom of Information Act.
712 F.2d 1462 (1983)	Arieff v. U.S. Dept. of Navy	x			Reversing summary judgment for Navy where journalist had sought Freedom of Information disclosure of information as to prescription drugs supplied by Navy to Office of Attending Physician to Congress. Lower court could have restricted application for information to segregate portions of records.
711 F.2d 211 (1983)	Jordan v. Medley	x			Reversal of lower court award of compensatory and punitive damages in landlord tenant dispute involving brandishment of loaded rifle. Misapplication of landlord/tenant, principal/agent, and evidenciary law by lower court.
705 F.2d 1364 (1983)	Toney v. Block	x			Determination that race was not a factor in decision of personnel office to promote white employee over plaintiff, a black employee, was supported by the evidence.
703 F.2d 1297 (1983)	Dana Corp. v. I.C.C.	x			Granted petitioner's prayer for review of I.C.C. order relative to rates assessed by several railroads on specially equipped cars.

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CITATION	STYLE OF CASE	OPINION MAJ	OPINION CONC	OPINION DIS	LEGAL ISSUES INVOLVED IN CASE
703 F.2d 586 (1983); rev., 468 U.S. 288 (1984)	Community for Non-Violence v. Watt			x	U.S. Park Service regulation against sleeping in parks unconstitutionally applied to demonstrators' expressive conduct.
702 F.2d 1189 (1983)	Dozier v. Ford Motor Company	x			Res judicata
702 F.2d 1183 (1983)	AFGE Local 2782 v. F.L.R.A.	x			Granting Union's petition for review of Federal Labor Relations Authority's affirmance of agency's refusal to bargain over certain proposal. Proposal not nonnegotiable simply because it envisions some constraints upon rights generally reserved in other contexts to management.
702 F.2d 1079 (1983); rev. 468 U.S. 317 (1984)	United States v. Richardson			x	Is denial of a double jeopardy claim based on the insufficiency of evidence immediately appealable to court of appeals?
700 F.2d 727 (1983)	Drukker Communications, Inc., v. N.L.R.B.	x			Setting aside N.L.R.B. determination and order against employer and parent corp. in unfair labor practice action.
699 F.2d 1185 (1983)	KCST-TV, Inc. v. F.C.C.			x	F.C.C. acted arbitrarily by failing to give "hard look" at application for waiver of agency rule by not considering all relevant factors.
698 F.2d 1239 (1983); rev. 467 U.S. 340 (1984)	Community Nutrition Institute v. Block		x	x	Standing, exhaustion of administrative remedies.
697 F.2d 1146 (1983)	American Trucking Associations, Inc. v. I.C.C.	x			Interpretation of the Motor Carrier Act by I.C.C. not arbitrary, capricious abuse of discretion or contrary to law.
695 F.2d 583 (1982)	U.S. v. Donelson	x			Statute authorizing incarceration of youthful offenders for period longer than an adult could be sentenced for same act not violative of equal protection clause nor is the fact that a magistrate could only sentence youth to max. of one year while district judge could sentence to max. of six years under stat.
685 F.2d 698 (1982); vac. and remand, 464 U.S. 979 (1983)	Washington Post Co. v. U.S. Dept. of State			x*	* Statement of disagreement of denial of rehearing en banc. Judge Scalia not a member of three judge panel hearing case. Issues: Exemptions from disclosure under the Freedom of Information Act.